Supreme Court, U.S.
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No.

In the Supreme Court of the United States

BAIARDI FOOD CHAIN,

Petitioner,

v.

THE UNITED STATES OF AMERICA,
THE UNITED STATES DEPARTMENT OF AGRICULTURE,
and THE SECRETARY OF AGRICULTURE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do buyers and sellers of fresh produce have a constitutional right to contract outside of the sanctions of the Perishable Agricultural Commodities Act, 1930, as amended [7 U.S.C. § 499a-499s] (the "PACA"), the regulations promulgated under the PACA [7 C.F.R. §§ 46.1-49], and the rules of practice governing formal adjudicatory proceedings instituted by the Secretary under various statutes [7 C.F.R. §§ 1.130 - 1.151]?

PARTIES TO PROCEEDING

Petitioner is Baiardi Food Chain Corp.

Respondents are the United States of America, the United States Department of Agriculture ("USDA"), and the Secretary of Agriculture. The USDA is the federal agency responsible for administering disciplinary administrative proceedings under the Perishable Agricultural Commodities Act, 1930, as amended [7 U.S.C. § 499a-499s] ("PACA"), the regulations promulgated under the PACA [7 C.F.R. §§ 46.1-.49], and the rules of practice governing formal adjudicatory proceedings instituted by the Secretary under various statutes [7 C.F.R. §§ 1.130 - 1.151].

RULE 29.6 STATEMENT

Baiardi Food Chain Corp. ("Baiardi") is a corporation organized and existing under the laws of the State of New Jersey with a principal office located at 21 Empire Boulevard, South Hackensack, New Jersey 07606. Baiardi was licensed as a wholesaler of fresh produce by the Secretary under the PACA from June 8, 1948 until June 8, 2001.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Baiardi Food Chain Corp. respectfully petitions for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is published at 482 F.3d 239 (3d Cir. 2007). Petition for rehearing was denied without opinion. Unpublished Order issued May 2, 2007.

The decision and order of the USDA denying the petition for reconsideration is published at 65 Agric. Dec. 1994 (November 15, 2005). The Decision and order of the USDA Judicial Order affirming the decision below is published at 64 Agric. Dec. 1822 (September 2, 2005). The decision and order of the USDA Administrative Law Judge is published at 64 Agric. Dec. 1102 (April 8, 2005).

JURISDICTION

The United States Court of Appeals for the Third Circuit issued its opinion on March 2, 2007, and its order denying rehearing on May 2, 2007. (App. at 1a, 17a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant provisions of the PACA and regulations promulgated thereunder are reproduced in Appendix F to this petition.

STATEMENT OF THE CASE

This petition seeks review of a decision of the United States Court of Appeals for the Third Circuit upholding a decision of the United States Department of Agriculture ("USDA") with respect to whether buyers and sellers of fresh produce may opt out of the regulations of the PACA, specifically, section 2(4) (7 U.S.C. § 499b(4)), governing prompt payment, and, consequently, the applicable regulatory sanctions that apply thereunder.

(a) Petitioner believes that the decision of the Court of Appeals is inconsistent with the decision of the Court of Appeals for the Second Circuit in *American Banana v. Republic National Bank of New York, N.A.*, 362 F.3d 33 (2d Cir. 2004).

(b) Petitioner also believes that the decision of the Court of Appeals is inconsistent with the Constitutional right of buyers and sellers of fresh produce to contract outside of the ambit of the PACA and its regulations.

(c) Finally, petitioner believes that this is an exceptionally important issue to buyers and sellers of fresh produce in interstate and foreign commerce.

Petitioner, Baiardi Chain Food Corp. ("Baiardi"), was a corporation licensed under the PACA from June 8, 1948 until June 8, 2001. The Secretary filed a complaint in this case on August 1, 2001, alleging that Baiardi, "during the period March 2000 through January 2001, failed to make full payment promptly to 67 sellers of the agreed purchase prices in the total amount of $830,728.39 for 343 lots of perishable agricultural commodities...received and accepted in interstate and foreign commerce, in willful violation of section 2(4) of

the PACA (7 U.S.C. § 499b(4)." Baiardi filed an answer denying the allegations in the complaint on October 15, 2001. A hearing was held in New York on February 2, 2004 and concluded May 25, 2005.

On April 8, 2005, the ALJ issued a decision concluding that petitioner committed violations of the PACA as set forth in the complaint. On July 27, 2005 petitioner filed an appeal to the USDA Judicial Officer ("JO"), who issued a decision on September 2, 2005 upholding the findings and decision of the ALJ. *In re Baiardi Chain Food Corp.*, 64 Agric. Dec. 1822 (Sept. 2, 2005). On October 12, 2005, petitioner filed a petition to reconsider. And, on November 15, 2005, the JO issued his decision affirming the two previous decisions. *In re Baiardi Chain Food Corp.*, 64 Agric. Dec. 1994 (Nov. 15, 2005).

Baiardi contends that the prompt payment provision of section 2(4) of the PACA is not applicable to transactions in which the produce buyer and seller agree to extend the time of payment beyond that set forth in the PACA regulations. The JO rejected this contention, stating that "parties to a produce transaction may elect to use a different time for payment; however, *the parties must reduce their agreement to writing before entering into the transaction* and must maintain a copy of the agreement in their records." (emphasis in original).

The Third Circuit summarized the case as follows:

> At issue in this petition is whether post-default agreements, entered into by a company licensed under the Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. §§ 499a-499s, and its produce suppliers, which set the payment for the produce at an

> amount lower than the invoice price, bar the United States Department of Agriculture ("USDA") from enforcing the prompt payment provisions of the PACA. Baiardi Chain Food Corp. ("Baiardi") appeals the final order of the Secretary of the USDA, entered on September 2, 2005, which found Baiardi in violation of section 2(4) of the PACA, 7 U.S.C. § 499b(4), for failure to fully and promptly pay its suppliers of perishable agricultural commodities. The Secretary sanctioned Baiardi by ordering publication of the facts and circumstances of Baiardi's violations. We will affirm the decision of the Secretary and deny the petition for review.

Baiardi Food Chain v. United States, 482 F.3d 238 (3d Cir. 2007).

Petitioner is substantially aggrieved in three distinct ways:

(1) *One substantial consequence of the Secretary's decision is that once the decision becomes final, the principals of Baiardi will not be able to work in the produce industry for at least one year and possibly longer.* 7 U.S.C. § 499h(b).

> **(b) Unlawful employment of certain persons; restrictions; bond assuring compliance; approval of employment without bond; change in amount of bond; payment of increased amount; penalties**
>
> Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person—
>
> (1) whose license has been revoked or is currently suspended by order of the Secretary;

(2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect; or

(3) against whom there is an unpaid reparation award issued within two years, subject to his right of appeal under section 499g(c) of this title.

The Secretary may approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation or finding of flagrant or repeated violation of section 499b of this title, if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g (c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order. The Secretary, based on changes in the nature and volume of business conducted by the licensee, may require an increase or authorize a reduction in the amount of the bond. A licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and if the licensee fails to do so the approval of employment shall automatically terminate.

> The Secretary may, after thirty days notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section. The Secretary may extend the period of employment sanction as to a responsibly connected person for an additional one-year period upon the determination that the person has been unlawfully employed as provided in this subsection.

(2) *Petitioner is also substantially aggrieved that its Constitutional right to contract has been preempted by the PACA regulations.*

The contract is an integral component of a market economy. From the dawn of recorded history men and women have employed binding agreements to predict, control and stabilize the future. Moreover, contract law is a key component of a free society. In order to be effective in a free society, the contract must be a tool of unlimited adaptability. Thus, legislatures and judges should refrain from substituting their own judgments in cases where they believe that there is an unequal bargaining power or where they think, as here, that certain contracts are not in the public interest.

(3) *Petitioner also believes that the Third Circuit's decision is unnecessary to protect the interstate and international flow of fresh produce.*

The Perishable Agricultural Commodities Act of was adopted as a Depression-era regulation of the produce industry. "PACA is an intentionally rigorous law whose primary purpose is to exercise control over an industry which is highly competitive, and in which the opportunities for sharp practices, irresponsible conduct and unfair methods are

numerous." *Wayne Cusimano. Inc. v. Block*, 692 F.2d 1025, 1028 n.2 (C.A.5 1982) (*quoting* 1956 U.S. Code Cong. & Admin.. News 3699, 3701). "The PACA is a remedial statute designed to ensure that commerce in agricultural commodities is conducted in an atmosphere of financial responsibility." *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 782 (D.C. Cir. 1988).

The PACA was amended in 1984 to add a provision for a statutory trust for the benefit of unpaid suppliers of fresh produce. Section 5 of the PACA, 7 U.S.C. § 499e, creates a statutory trust for the benefit of unpaid sellers or suppliers of perishable agricultural commodities, the *corpus* of which consists of the perishable agricultural commodities received, all inventories of food or other products derived from the perishable agricultural commodities received, any receivables or proceeds from the sale of such commodities or products, and any non-produce related assets purchased with trust monies. *See In re Atlantic Tropical Market*, 118 Bankr. 139 (Bankr. S.D. Fla, 1990).

However, the Second Circuit has stated "that Congress's intention in not applying the trust to 'any credit transaction that extends beyond a reasonable period,' H.R. Rep. No. 98-543, at 6-7 (1983), *reprinted in* 1984 U.S.C.C.A.N. 405, 410, is best effectuated by understanding section 46.46(e)(2) of the PACA regulations to be applicable to post-default as well as pre-transaction agreements." *American Banana*, 362 F.3d at 45. "Sellers who are willing and able to enter into such agreements - whether pre-transaction or post-default - neither need nor deserve the elevated priority they receive under PACA's trust provision." They stated, "...we hold that where, as here, a seller agrees--orally or in writing--to a payment period exceeding thirty days, it forfeits trust protection." *Id.* at 46.

The Seventh Circuit is in accord. "By disqualifying suppliers who enter into post-default agreements that violate PACA, we can assure that the extraordinary protection provided by the PACA is not enlarged beyond its intended scope." *Greg Orchards & Produce, Inc. v. Roncone*, 180 F.3d 888, 892 (7th Cir. 1999). *See, also*, *Tri-County Wholesale Produce Co. v. U.S.D.A.*, 822 F.2d 162, 163 (D.C. Cir. 1987) (noting that a primary "goal of [PACA is] that only financially responsible persons should be engaged in the business subject to the Act.")

If parties to such post-default agreements are not entitled to the protections of the PACA, why then should petitioner be sanctioned for such a transaction?

REASONS WHY THE WRIT SHOULD BE GRANTED

This petition for a writ of certiorari should be granted for two principal reasons. First, the Third Circuit's opinion operates to negate the intent of Congress as to what perishable agricultural commodity transactions were intended to be regulated under the PACA. Second, petitioner believes that the unnecessarily infringes its Constitutional right to contract.

I. The Third Circuit's Opinion Operates To Negate The Intent Of Congress As To What Perishable Agricultural Commodity Transactions Were Intended To Be Regulated Under The PACA.

In discussing legislative intent in this regard, the Second Circuit, noted:

> "Resort to authoritative legislative history may be justified where there is an open question as to the meaning of a word or phrase in a statute, or where a

statute is silent on an issue of fundamental importance to its correct application.." [*United States v. Gayle*, 342 F.3d 89, 93-94 (2d Cir.2003)]

The House Report accompanying the 1984 amendment to PACA makes clear that Congress intended trust protection to extend solely to cash and short-term credit transactions:

> The committee finds that it is common practice in the produce business to extend credit for reasonable periods of time beyond the time prescribed for 'cash' transactions in regulations issued by the Secretary under the provisions of the Packers and Stockyards Act. Consequently, to be effective, the trust applies to credit transactions as well as to the straight cash transactions. *However, the committee does not intend the trust to apply to any credit transaction that extends beyond a reasonable period.* Under the bill, the Secretary is required to establish, through rulemaking, the time by which, the parties to a transaction must agree payment on a transaction must be made, to qualify it for coverage under the trust. *An agreement for payment after such time will not be eligible to receive the benefits of the trust.*

H.R. Rep. No. 98-543, at 6-7 (1983), *reprinted in* 1984 U.S.C.C.A.N. 405, 410 (emphases added). The thirty-day provision thus resulted from Congress's explicit desire to limit its extension of trust protection to reasonably short-term credit arrangements:

> Congress directed the Secretary to establish the maximum time by which the parties to a transaction can agree payment must be made and still qualify for coverage under the trust. An agreement for payment after such time will not qualify for trust coverage.
>
> Current payment practices, as reflected by administrative experience and industry sources, indicate that contracts calling for payment within 30 days from receipt and acceptance of the goods should qualify for trust coverage, and that contracts that call for later payment should not qualify for trust coverage.

Trust Regulations, *supra,* 49 Fed.Reg. at 45738. The primary objective of securing prompt payment was to protect sellers in this volatile industry. *See* H.R. Rep. No. 98-543, at 2-4 (1983), *reprinted in* 1984 U.S.C.C.A.N. 405, 406-07 ("Producers and shippers of perishable commodities are, for the most part, small size businesses. The process of growing[,] harvesting, packing and shipping perishables is a real gamble; costs are high, capital is tied up in farm land and machinery, and returns are delayed until the crop is sold. If the grower-shipper cannot realize any returns on the sale of the crop when due, he may not be able to survive."). Congress made its intention to protect short-term payment arrangements clear by expressly refusing to bestow trust protection upon "any credit transaction that extends beyond a reasonable period," H.R. Rep. No. 98-543, at 6-7 (1983), *reprinted in* 1984 U.S.C.C.A.N. 405, 410. The USDA's regulations tying the definition of a "reasonable period" to its definition of "full payment promptly"

corroborate our interpretation. 7 C.F.R. §§ 46.46(e)(1)-(2), 46.2(aa)(5), (11).

The question becomes, therefore, whether there is a meaningful difference between pre-transaction and post-default agreements in light of this legislative history. We conclude that there is not. We recognize that a post-default agreement is often the product of a reasonable effort by a seller to recover at least some of the debt owed to it without incurring the risks and costs of litigating under PACA, and that such an agreement therefore can be a useful tool for the recovery of unpaid debts. However, the result of a post-default agreement extending the payment period beyond thirty days is no different than that of a pre-transaction agreement doing the same: both are inconsistent with the prompt-payment objective, which is fundamental to PACA. Whether the agreement is reached before the transaction or after a buyer has defaulted, it constitutes a credit arrangement permitting a buyer to make payments that are not considered prompt by Congress and the USDA.

Furthermore, such credit arrangements, though intended to enable buyers who are unable to make prompt payments to stay in business, can have negative, industry-wide implications:

> Just as in the case of the savings and loan industry, if a PACA licensee is in financial difficulty (i.e., not able to pay the agreed purchase prices of perishable agricultural commodities promptly), the loss to the perishable agricultural commodities industry as a whole is frequently much less if the PACA

> licensee's license is revoked promptly. Allowing a PACA licensee that is in financial difficulty to remain in business increases financial risks to others. Frequently, a PACA licensee in financial difficulty increases its volume significantly, perhaps taking imprudent risks. If the PACA licensee's efforts to regain financial stability are unsuccessful, many other unsuspecting persons are exposed to the risk of nonpayment.

Havana Potatoes, 55 Agric. Dec. 1234. This is particularly true after a buyer has demonstrated its financial instability by defaulting on its payment obligations. Therefore, Congress could not have intended to exempt from disqualification sellers who enter into post-default agreements extending a payment period beyond thirty days, while specifically disqualifying sellers who enter into pre-transaction agreements having the same effect. Sellers who are willing and able to enter into such agreements--whether pre-transaction or post-default--neither need nor deserve the elevated priority they receive under PACA's trust provision. As the Seventh Circuit recently observed:

> Another major objective of PACA is to avoid large financial collapses in the produce industry. The strict 30-day time limits are purposely designed to bring a subper-forming [sic] dealer to the attention of the USDA quickly, so that it can act to resolve the problem or suspend the dealer's license. If one industry member is in financial distress, not much is at stake. But if many large

> wholesalers work out long-term payment plans and extensions, allowing a dealer to amass huge liabilities, that dealer's eventual bankruptcy or license revocation could cause much more severe repercussions throughout the industry. One would not want to reward the wholesalers who helped create such a mess by then giving them a strong right to recover their debts through superpriority in bankruptcy or through trust suits piercing the corporate veil.

Patterson Frozen Foods, 307 F.3d at 671; *see also Greg Orchards & Produce, Inc. v. Roncone*, 180 F.3d 888, 892 (7th Cir.1999) ("By disqualifying suppliers who enter into post-default agreements that violate PACA, we can ensure that the extraordinary protection provided by PACA is not enlarged beyond its intended scope."); *Tri-County Wholesale Produce Co. v. U.S.D.A.*, 822 F.2d 162, 163 (D.C. Cir.1987) (noting that a primary "'goal of [PACA is] that only financially responsible persons should be engaged in the businesses subject to the Act'" (quoting *Finer Foods Sales Co., Inc. v. Block*, 708 F.2d 774, 782 (D.C. Cir.1983)) (alteration in original)).

Accordingly, we conclude that Congress's intention in not applying the trust to "any credit transaction that extends beyond a reasonable period," H.R. Rep. No. 98-543, at 6-7 (1983), *reprinted in* 1984 U.S.C.C.A.N. 405, 410, is best effectuated by understanding section 46.46(e)(2) of the PACA

> regulations to be applicable to post-default as well as pre-transaction agreements.

American Banana v. Republic National Bank of New York, N.A., 362 F.3d 33, 44-45 (2d Cir. 2004)

Thus, under the bill, the Secretary was required to establish, through rulemaking, the time by which, the parties to a transaction must agree payment on a transaction must be made, to qualify it for coverage under the trust. An agreement for payment after such time will not be eligible to receive the benefits of the trust. Baiardi submits that it makes nu sense to penalize a buyer for not making payment within the time set by the Secretary in the rules, when the seller has already opted out of the trust provision and agreed not to be paid promptly. Congress did not intend its legislation as a substitute for free market forces in every produce transaction.

II. Buyers And Sellers Of Fresh Produce Have A Constitutional Right To Contract Outside The Sanctions Of The PACA.

In its decision of March 2, 2007, the Third Circuit stated that "Baiardi's interpretation of the statute would eliminate the ability of the Secretary to enforce proper buying and selling practices." Decision at 10. In fact, the statute allows buyers and sellers to opt their transactions out of the PACA. Section 2(4) of the PACA mandates that produce buyers make payment within ten days of the date on which the produce is accepted, unless otherwise expressly agreed in writing by the parties to the sale prior to the time of the transaction. 7 C.F.R. § 46.2(aa)(5), (11). The Second Circuit has determined that sellers who offer payment periods of longer than thirty days are not entitled to PACA trust protection. Furthermore, a post-default agreement between seller of

perishable agricultural commodities and a dealer that extends dealer's time for payment beyond 30 days will result in a loss of seller's PACA trust protection, whether agreement is oral or in writing. *American Banana v. Republic National Bank of New York, N.A.*, 362 F.3d 33, 45-46 (2d Cir. 2004). This is exactly what happened under the facts in Baiardi.

The court also opined that "[t]he issue before us is not whether the produce sellers are entitled to trust protection but whether the arrangements between the parties regarding payment affect the Secretary's power to enforce the statute." Decision at 9. Baiardi agrees that this is exactly the issue on appeal, and postulates that if the parties elect to exercise their constitutional rights to a contract that calls for payment outside of the parameters of the PACA, such that full payment promptly as defined under the PACA is not applicable, then it is illogical for the Secretary to penalize one of the parties for not making full payment promptly under the Secretary's implementation and interpretation of the Regulations. Under this Court's interpretation of the PACA and the Regulations promulgated thereunder, parties may opt out of the trust provisions of the statute, but not the regulatory provisions. Baiardi respectfully disagrees.

American Banana, *supra*, took the case law interpretation of the PACA to a new level by holding that:

> We find nothing in the text of PACA or in its regulations which requires that a provable post-default agreement extending a payment period beyond thirty days must, without exception, be reduced to writing before it will disqualify a seller from PACA's trust protection. The regulations merely provide that "[p]arties who elect to use different times of payment...must reduce their agreement to writing

before entering into the transaction." 7 C.F.R. § 46.2(aa). In view of Congress's clearly expressed intention to extend trust protection solely to cash and short-term credit transactions, *see* 7 U.S.C. § 499e(c); 7 C.F.R. § 46.46e(c); 7 C.F.R. §§ 46.46(e), 46.2(aa), we cannot interpret this regulation to mean that parties are free to enter into agreements that violate PACA's prompt payment rules as long as they do not reduce their agreements to writing.

Rather, we conclude that a failure to reduce to writing an agreement that violates PACA, should not result in the preservation of the trust, where the same agreement, if memorialized, would have resulted in forfeiture of such protection. To hold otherwise would yield the unacceptable result of preserving trust protection for a seller who reaches an agreement containing a payment period exceeding thirty days and performs thereunder so long as the seller does not reduce the agreement to writing. Accordingly, we hold that where, as here, a seller agrees – orally or in writing – to a payment period exceeding thirty days, it forfeits trust protection.

Even if we were to assume *argued* that a writing is required, we hold that there are writings in this case that satisfy the generally applicable Statute of Frauds, and that such writings are sufficient to disqualify the Sellers from trust protection. *See Paterson Frozen Foods, Inc. v. Crown Foods Int'l., Inc.*, 307 F.3d 666, 671 (7th Cir. 2002)("PACA rights are lost whenever the parties enter into a written agreement that satisfies the generally applicable Statute of Frauds."). As discussed, PACA does not set out specific

requirements for post-default agreements, and under the Restatement of Contracts,

> [u]nless additional requirements are prescribed by the particular statute, a contract within the Statute of Frauds is enforceable if it is evidenced by any writing, signed by or on behalf of the party to be charged, which
>
> (a) reasonably identifies the subject matter of the contract,
>
> (b) is sufficient to indicate that a contract with respect thereto has been made between the parties or offered by the signer to the other party, and
>
> (c) states with reasonable certainty the essential terms of the unperformed promises in the contract. Restatement (Second) of Contracts § 131 (1981).

American Banana v. Republic National Bank of New York, N.A., 362 F.3d at 46-47.

Freedom to contract has been the cornerstone of American prosperity. Americans have built their wealth by engaging in private transactions for the mutual benefit of all parties, as well as society at large. The framers of the United States Constitution recognized how essential the right to contract is to freedom and economic prosperity. They expressly prohibited interference with private contracts in the original Constitution, prior even to passage of the Bill of Rights. U.S. Const. Art. I, § 10 ("No State shall pass any law impairing the Obligation of Contracts."). The Bill of Rights likewise

included such protection in the Fifth Amendment. U.S. Const. Amend. V. For more than one hundred years the courts applied this clause to protect the right to contract. *See, e.g., Adair v. United States*, 208 U.S. 161 (1908) (holding that an employer has the same right to prescribe terms on which to hire an employee as an employee has to prescribe terms on which he will sell his labor, and legislation which interferes with this right is an unjustified interference with liberty of contract).

Historically, the judiciary has opposed efforts by government to interfere with the private right to contract. Between 1899 and 1937 --- which includes the depths of the Great Depression --- the Supreme Court invalidated 197 separate state or federal regulations based on their interference with contractually-related rights. L. Tribe, American Constitutional Law § 8-2 & n.2 (2d Ed. 1988). The judiciary rightly viewed its role as a defender of the fundamental right to contract.

One hundred years ago the judiciary was a vigorous defender of legitimate constitutional rights on behalf of the American people. Twenty-five years ago the judiciary seemed to have abandoned its defense of contractual rights, but still respected their enforce ability. Now courts are themselves affirmatively interfering with contractual rights. Many dangerous precedents set by the courts are the alarming result of relentless attacks on the right to contract. Governmental efforts, whether by the legislature or the judiciary, to control the right to contract are inevitably futile, because the free markets are more powerful than any government. History teaches that vigilance is required to defend against never-ending attempts by governments to interfere arbitrarily with economic rights.

In summary, Baiardi argues that it, as well as its sellers, have the right to take their transactions out of PACA, notwithstanding the Secretary's interpretation of the PACA regulations.

This Court has stated that:

> In American Banana, 362 F.3d 45-46, the Court of Appeals for the Second Circuit held that a post-default agreement between a seller of perishable agricultural commodities and a dealer, which extends the dealers time for payment beyond thirty days, will result in a loss of the seller's PACA trust protection, whether the agreement is oral or in writing - to a payment period exceeding thirty days, it forfeits trust protection." Id. At 47. In holding that the trust provision was not intended to protect produce sellers who did not insist upon prompt payment within thirty days, the Second Circuit asserted, "[s]ellers who are willing and are able to enter into such [credit] agreements...whether pre-transaction or post-default - neither need nor deserve the elevated priority they receive under PACA's trust provision.

Decision at 8.

The PACA is primarily designed to protect farmers and produce sellers. However, if a seller exercises its constitutional right to contract itself out of the protections of the PACA, the other party to the contract, the Buyer, is sanctioned. American history does not support this result, and American Jurisprudence should not either.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 31, 2007

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 06-1124

[Filed May 2, 2007]

BAIARDI FOOD CHAIN,
Petitioner,

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF AGRICULTURE; THE SECRETARY OF AGRICULTURE,
Respondents.

SUR PETITION FOR PANEL REHEARING

Present: SLOVITER, RENDELL and CUDAHY*, *Circuit Judges.*

* Hon. Richard D. Cudahy, United States Senior Circuit Judge for the United States Court of Appeals for the Seventh Circuit, sitting by designation, as to panel rehearing only.

The petition for rehearing filed by Petitioner, Baiardi Food Chain, in the above-entitled case having been submitted to the judges who participated in the decision of this court, and no judge who concurred in the decision having asked for rehearing, the petition for rehearing is denied.

By the Court,

/s/ Dolores K. Sloviter
Circuit Judge

Dated: May 2, 2007

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 06-1124

[Filed March 2, 2007]

BAIARDI FOOD CHAIN, Petitioner,	)
v.	)
UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF AGRICULTURE; THE SECRETARY OF AGRICULTURE, Respondents.	)

On Petition for Review of an Order of United States Department of Agriculture
(D-01-0023)
Judicial Officer: William G. Jenson

Submitted Under Third Circuit LAR 34.1(a)
January 19, 2007

Before: SLOVITER, RENDELL, and CUDAHY,*
Circuit Judges

OPINION OF THE COURT

SLOVITER, *Circuit Judge*.

At issue in this petition for review is whether post-default agreements, entered into by a company licensed under the Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. §§ 499a-499s, and its produce suppliers, which set the payment for the produce at an amount lower than the invoice price, bar the United States Department of Agriculture ("USDA") from enforcing the prompt payment provisions of the PACA. Baiardi Chain Food Corp. ("Baiardi")[1] appeals the final order of the Secretary of the USDA, entered on September 2, 2005, which found Baiardi in violation of section 2(4) of the PACA, 7 U.S.C. § 499b(4), for failure to fully and promptly pay its suppliers of perishable agricultural commodities. The Secretary sanctioned Baiardi by ordering publication of the facts and circumstances of Baiardi's violations. We will affirm the decision of the Secretary and deny the petition for review.

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* Hon. Richard D. Cudahy, United States Senior Circuit Judge for the United States Court of Appeals for the Seventh Circuit, sitting by designation.

[1] Baiardi was licensed under the PACA from June 8, 1948 until its license terminated when it failed to pay the annual PACA renewal fee on June 8, 2001.

I.

The material facts of this case are not in dispute. The Agricultural Marketing Service of the USDA initiated an investigation of Baiardi after receiving several complaints between October 2000 and January 2001 from suppliers seeking reparation for unpaid produce shipments. In January 2001, Carolyn Shelby, a PACA marketing specialist with the USDA, conducted an investigation of Baiardi's business practices and met with David Axelrod, the owner of the corporation. Axelrod provided Shelby with hundreds of unpaid invoices. The invoices revealed that Baiardi failed to make full payment promptly for 343 lots of perishable agricultural commodities from sixty-seven sellers, amounting to a debt owed of $830,728.39.

In January 2001, Baiardi notified its sellers (in most instances the producers of the agricultural products) that it was going out of business. Baiardi negotiated work-out agreements with several of the sixty-seven producers to whom Baiardi owed payment. Pursuant to those work-out agreements, the produce sellers accepted payment of approximately fifty cents on the dollar for the money Baiardi owed. The producers were willing to resolve Baiardi's indebtedness quickly because, due to Baiardi's impending demise, several companies feared they would receive none of the money they were owed if they chose not to settle. At least two other accounts were settled through court dispositions.

On August 2, 2001, the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service of the USDA issued a complaint charging Baiardi with violating section 2(4) of the PACA. On October 16, 2001, Baiardi filed an answer denying the allegations in the complaint. Chief Administrative Law Judge (ALJ) Marc R.

Hillson conducted a hearing in New York on February 2, 2004 and May 25, 2004, during which the agency called four witnesses and entered seventy-six exhibits into evidence. Baiardi called no witnesses but entered fifty-five exhibits into evidence through cross-examination of the agency's witnesses.

On April 8, 2005, the ALJ issued his decision and order, finding that Baiardi, from March 2000 through January 2001, failed to make full payment promptly for 343 lots of perishable agricultural commodities from sixty-seven producers in violation of section 2(4) of the PACA. On July 27, 2005, Baiardi appealed the ALJ Decision to the Secretary of the Department of Agriculture. On September 2, 2005, the Judicial Officer ("JO"), acting for the Secretary, affirmed the ALJ's decision and ordered that the facts and circumstances of Baiardi's violations be published, pursuant to the Secretary's authority under 7 U.S.C. § 499h(a). That section provides that if the buyer has "violated any of the provisions of [section 2 of the PACA, including 2(4)] . . . the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke, the license of the offender." *Id.* Because Baiardi had failed to pay its license renewal fee, its PACA license terminated in June 2001; as such, the only sanction open to the Secretary was the publication of the facts and circumstances of the case. Baiardi filed a motion for reconsideration which the JO denied. Baiardi filed a timely petition for review with this Court.

II.

This Court has jurisdiction to review the Secretary's final order pursuant to 28 U.S.C. § 2342. Judicial review of the decision of an administrative agency is narrowly confined. Pursuant to the Administrative Procedure Act, this Court reviews final decisions by the Secretary of Agriculture under a deferential standard. 5 U.S.C. § 706 states, in pertinent part:

> To the extent necessary to decision and when presented, the reviewing court shall . . . .
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be--
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . . .

This applies in full force to judicial review of sanctions imposed under the PACA. *Wayne Cusimano, Inc. v. Block*, 692 F.2d 1025, 1030 (5th Cir. 1982). "The choice of sanctions imposed by the Secretary of Agriculture, through [the] Judicial Officer, may not be overturned in the absence of a patent abuse of discretion." *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980).

Congress enacted the PACA in 1930 to promote fair trading practices in the produce industry. *See Tanimura & Antle, Inc. v. Packed Fresh Produce, Inc.*, 222 F.3d 132, 135 (3d Cir. 2000) (citing *Idahoan Fresh v. Advantage Produce, Inc.*, 157 F.3d 197, 199 (3d Cir. 1998)). Under the PACA, every dealer of perishable agricultural commodities is

required to be licensed by the Secretary of Agriculture. *Id.*; *see also Allred's Produce v. United States Dep't of Agriculture*, 178 F.3d 743, 745 (5th Cir. 1999) (citing 7 U.S.C. § 499c(a)). "Congress intended to protect small farmers and growers who were especially vulnerable to the practices of financially irresponsible . . . 'buyers.'" *Tanimura*, 222 F.3d at 135; *see also Idahoan Fresh*, 157 F.3d at 199.

Under the PACA, it is unlawful for buyers of produce to fail to make prompt payment for a shipment of produce. Section 2(4) of the PACA states:

> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:
>
> (4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and *make full payment promptly* in respect of any transaction in any such commodity to the person with whom such transaction is had
>
> . . . .

7 U.S.C. § 499b(4) (emphasis added).

A buyer's failure to tender prompt payment triggers civil liability and the possible revocation of the buyer's PACA

license which is required by 7 U.S.C. § 499c. The PACA is "admittedly and intentionally a 'tough' law." S. Rep. No. 84-2507 (1956), *as reprinted in* 1956 U.S.C.C.A.N. 3699, 3701, which

> is designed to protect the producers of perishable agricultural products who in many instances must send their products to a buyer or commission merchant who is thousands of miles away. It was enacted to provide a measure of control over a branch of industry which is almost exclusively interstate commerce, is highly competitive, and presents many opportunities for sharp practice and irresponsible business conduct.

Zwick v. Freeman, 373 F.2d 110, 116 (2d Cir. 1967) (citing H.R.Rep. No. 84-1196 (1955), *as reprinted in* 1956 U.S.C.C.A.N. 3701, 3701).

Congress amended the PACA in 1984 to add a section providing for a statutory trust to benefit unpaid suppliers of fresh produce. 7 U.S.C. § 499e(c). The statutory trust provision was created in response to congressional concern over the "increase in the number of buyers who failed to pay, or were dilatory in paying, their suppliers, and the impact of such payment practices on small suppliers who could not withstand a significant loss or delay in receipt of monies owed." *Tanimura*, 222 F.3d at 134-35 (holding that because sellers who qualified as PACA trust beneficiaries "demonstrated the likelihood of dissipation of trust fund assets and the likelihood of irreparable harm, the District Court should have granted the injunction sought.")

The trust consists of the perishable agricultural commodities received, all inventories of food or other products derived from the perishable commodities received,

and any receivables or proceeds from the sale of such commodities or products. The trust holds all proceeds and receivables from the sale of produce by a dealer until the dealer pays the seller the full purchase price. 7 U.S.C. § 499e(c). The trust thus provides an additional remedy for sellers against a buyer failing to make prompt payment. *Idahoan Fresh*, 157 F.3d at 199 (citing H.R. Rep. No. 98-543, at 2 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 405, 406). "Prior to this amendment, unpaid produce suppliers were unsecured creditors vulnerable to the buyers' practice of granting other creditors a security interest in their inventory and accounts receivable." *Id.* (citing *Tom Lange Co. v. Lombardo Fruit & Produce Co. (In re Lombardo Fruit & Produce Co.)*, 12 F.3d 806, 808-09 (8th Cir. 1994)).

Section 2 of the PACA imposes several strict requirements on regulated buyers and sellers. As stated above, section 2(4) mandates that all regulated parties "make full payment promptly" for all produce purchases. 7 U.S.C. § 499b(4). By regulation promulgated by the Secretary of Agriculture, "full payment promptly" requires that produce buyers make payment within ten days of the date on which the produce is accepted, unless otherwise expressly agreed in writing by the parties to the sale prior to the time of the transaction. 7 C.F.R. §§ 46.2(aa)(5), (11). Regulated parties must adhere to the "full payment promptly" provisions of the PACA to keep the transaction under the provisions of the trust. However, the regulations permit the parties to agree in writing before the transaction to other payment periods that do not exceed thirty days and still remain under the trust. 7 C.F.R. § 46.46(e)(2).

The protection of the trust is forfeited by an agreement between the parties for payment that exceeds thirty days. *See, e.g., American Banana v. Republic Nat'l Bank of N.Y., N.A.*, 362 F.3d 33, 47 (2d Cir. 2004) (stating that sellers who agree

to payment periods exceeding thirty days forfeit trust protection). The issue before us is whether such agreements have any effect on the Secretary's authority to penalize violations of the section 2 of the PACA pursuant to 7 U.S.C. 499h(a).

Baiardi asserts that the "full payment promptly" requirement found in section 2(4) of the PACA is not applicable to transactions in which the produce buyer and seller agree to an amount owed below the invoice price. It is undisputed that Baiardi and certain of its produce sellers agreed to a payment plan that amounted to approximately fifty cents on the dollar for every dollar owed. The parties also agreed to extend the payment period beyond the thirty-days set forth in the regulations. 7 C.F.R. § 46.2(aa)(5). In fact, Baiardi often made final payment of the reduced agreed-upon amount considerably beyond the thirty-day period.

The Courts of Appeals have consistently agreed with the Secretary's position that, absent a written agreement prior to the transaction, "full payment promptly" is payment of the entire invoice within ten days of acceptance of the produce. In *Allfred's Produce*, the Court of Appeals for the Fifth Circuit affirmed the JO's decision revoking petitioner's PACA license for failing to make full payment promptly to nineteen sellers for eighty-six lots of perishable agricultural commodities worth $336,153.40. In so holding, the Court stated, "'full payment promptly' means payment within 10 days of the date on which the produce is accepted, or payment within the time specified in writing by prior agreement of the parties." *Allfred's Produce*, 178 F.3d at 747. In *Havana Potatoes Corp. v. United States*, 136 F.3d 89, 91-92 (2d Cir. 1997), the Court of Appeals for the Second Circuit relied primarily on past-due invoices found in petitioner's files, which provided the USDA with evidence that over $1.9

million was owed to produce suppliers. Although the debts were eventually paid, they were settled after the PACA-specified dates, representing a violation under PACA. *Id.*

Baiardi has not provided any evidence that it entered into written agreements with any of its suppliers prior to the transactions. From the record, it appears that Baiardi, after defaulting on its payment, told its suppliers it was going out of business, and then settled some of its outstanding debts via work-out agreements.

In *American Banana*, 362 F.3d at 45-46, the Court of Appeals for the Second Circuit held that a post-default agreement between a seller of perishable agricultural commodities and a dealer, which extends the dealer's time for payment beyond thirty days, will result in a loss of the seller's PACA trust protection, whether the agreement is oral or in writing. The Court stated, "where, as here, a seller agrees -- orally or in writing -- to a payment period exceeding thirty days, it forfeits trust protection." *Id.* at 47. In holding that the trust provision was not intended to protect produce sellers who did not insist upon prompt payment within thirty days, the Second Circuit asserted, "[s]ellers who are willing and able to enter into such [credit] agreements -- whether pre-transaction or post-default -- neither need nor deserve the elevated priority they receive under PACA's trust provision." *Id.* at 45.

Relying on *American Banana*, Baiardi argues that by agreeing to terms outside the scope of the PACA, the sellers opted out of PACA and thus are no longer protected by its provisions. It concludes that, therefore, the Secretary is barred from enforcing the full and prompt payment provisions of the PACA and does not have jurisdiction to commence disciplinary action against Baiardi.

Baiardi's argument notwithstanding, *American Banana* is distinguishable from the instant appeal. In *American Banana*, the issue before the court was whether, by entering into post-default agreements with the produce dealer extending the time of payment more than thirty days after the transaction, the produce sellers forfeited their rights to PACA trust protection. In this appeal, it is the Secretary of Agriculture, not the producer, who initiated the complaint against the buyer. *See* 7 U.S.C. § 499f(c)(2). The issue before us is not whether the produce sellers are entitled to trust protection but whether the arrangements between the parties regarding payment affect the Secretary's power to enforce the statute. Although the court in *American Banana* held that the sellers lost PACA trust protection by entering into post-default agreements with the buyers, it did not purport to hold that such agreements deprive the Secretary of his statutory right to bring a complaint against a delinquent buyer. Such a holding would be contrary to the plain language of the statute and the regulations. They make clear that "[p]arties who elect to use different times of payment than [that] set forth in [7 C.F.R. § 46.2(aa)(5) -- ten days] must reduce their agreement to writing before entering into the transaction . . . ." 7 C.F.R. § 46.2(aa)(11), and upon determination that the buyer has "violated any of the provisions of [section 2 of the PACA, including 2(4)] . . . the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke, the license of the offender." 7 U.S.C. 499h(a).

Thus, although parties may agree to payment periods beyond thirty days, the consequence, as the Second Circuit held in *American Banana*, is loss of PACA trust protection. Such post-default agreements do not operate to divest the

Secretary of his right to "publish the facts and circumstances" of the buyer's violations. As the ALJ's decision in this case notes, "'it has been repeatedly held that a seller's agreement to accept partial payment because of the buyer's insolvency does not constitute a full payment or negate a violation of the PACA.'" App. at 26 (quoting *In re Full Fail Produce, Inc.*, 52 Agric. Dec. 608, 619 (1993)).

Moreover, at least two courts of appeals have explicitly held that even if creditors agree to accept partial payment as a settlement, the merchant still has not "paid fully" under the Act. *Finer Foods Sales Co., Inc. v. Block*, 228 U.S. App. D.C. 205, 708 F.2d 774, 782 (D.C. Cir. 1983) ("Such a belated payment of a small portion [seven percent] of a licensee's obligation does not constitute the making of the 'full payment promptly' that section 2(4) requires."); *Marvin Tragash Co., Inc. v. United States Dep't of Agriculture*, 524 F.2d 1255, 1258 (5th Cir. 1975) ("This partial payment [fifteen percent] under the plan entered into some months after the purchases can not be characterized as either full or prompt payment as required by the Act . . . ."). In both cases, the licensees were found guilty of "flagrant and repeated" violations of the Act and were prohibited from employment in the industry for one year.

Baiardi's interpretation of the statute would eliminate the ability of the Secretary to enforce proper buying and selling practices. The JO, in affirming the ALJ's decision, articulated the illogic of Baiardi's argument as follows:

> Respondent's contention that a produce seller's choice to accept half payment, when the other choice is to accept no payment at all, renders the situation not governable by the PACA and the debtor not subject to disciplinary action, is not consistent with the PACA,

> the Regulations, or case law. Indeed, the type of situation faced by Respondent's produce sellers -- accepting half payment or nothing -- is just the type of situation the PACA was designed to prevent.

App. at 26-27.

It is also important to note that not all of Baiardi's producer sellers agreed to partial payment and actually received the money owed. "A substantial amount of the $830,728.39 in non-payments alleged in the Complaint remains unpaid." App. at 27-28. Baiardi contends that only $30,000 remains due but, as the ALJ noted, "Even if all payments were made under the work-out agreements, and even with the two court 'dispositions,' over $570,000 of the $830,000 in non-payments alleged in the complaint remains unpaid." App. at 10. Assuming that the major portion of the non-payments referred to by the ALJ have been paid, it is undisputed that none of the sixty-seven produce sellers were fully or promptly paid according to the provisions of the PACA. We agree with the analysis of the JO that the parties have not limited the Secretary's authority to enforce the PACA.

III.

Based on the foregoing facts and law related to this case, we will deny the petition for review.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-1124

[Filed March 2, 2007]

BAIARDI FOOD CHAIN,	)
Petitioner,	)
	)
v.	)
	)
UNITED STATES OF AMERICA;	)
UNITED STATES DEPARTMENT OF	)
AGRICULTURE; THE SECRETARY OF	)
AGRICULTURE,	)
Respondents.	)
	)

On Petition for Review of an Order of United States Department of Agriculture
(D-01-0023)
Judicial Officer: William G. Jenson

Before: SLOVITER, RENDELL, and CUDAHY,*
Circuit Judges

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* Hon. Richard D. Cudahy, United States Senior Circuit Judge for the United States Court of Appeals for the Seventh Circuit, sitting by designation.

JUDGMENT

This cause came on to be considered on the record from an Order of the United States Department of Agriculture and was submitted under Third Circuit LAR 34.1(a) on January 19, 2007.

On consideration whereof, it is now hereby ADJUDGED and ORDERED that the Petition for Review of the Decision of the United States Department of Agriculture entered September 2, 2005 is denied. Costs taxed against Petitioner.

Attest:

/s/ Marcia M. Waldron
Clerk

DATED: March 2, 2007

APPENDIX C

UNITED STATES DEPARTMENT OF AGRICULTURE

PACA Docket No. D-01-0023

[Filed November 15, 2005]

In re: BAIARDI CHAIN FOOD CORP.)

Initial decision issued by Marc R. Hillson, Chief Administrative Law Judge

Order issued by William G. Jenson, Judicial Officer

PROCEDURAL HISTORY

Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on August 2, 2001. Complainant instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that Baiardi Chain Food Corp. [hereinafter Respondent], during the period March 2000 through January 2001, failed to make full payment promptly to 67 sellers of the agreed purchase prices in the total amount of $830,728.39 for 343 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate and foreign commerce, in willful violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶¶III-IV). On October 23, 2001, Respondent filed an Answer denying the material allegations of the Complaint (Answer ¶¶3-4).

On February 2, 2004, and May 25, 2004, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] presided over a hearing in New York, New York. David A. Richman, Office of the General Counsel, United States Department of Agriculture, represented Complainant.[1] Paul T. Gentile, Gentile & Dickler, New York, New York, represented Respondent.

On July 30, 2004, Complainant filed Complainant's Proposed Findings of Fact, Conclusions and Order, and on September 10, 2004, Respondent filed Respondent's Proposed Findings of Fact and Conclusions of Law. On October 4, 2004, Complainant filed Complainant's Reply Brief.

On April 8, 2005, the Chief ALJ issued a Decision [hereinafter Initial Decision]: (1) concluding Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make

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[1] On October 4, 2004, Jeffrey J. Armistead entered an appearance on behalf of Complainant, replacing David A. Richman as counsel for Complainant (Notice of Appearance, filed October 4, 2004).

full payment promptly to sellers of the agreed purchase prices for perishable agricultural commodities which Respondent purchased, received, and accepted in interstate and foreign commerce; and (2) ordering the publication of the facts and circumstances of Respondent's violations.

On July 27, 2005, Respondent appealed to the Judicial Officer. On August 16, 2005, Complainant filed Complainant's Response to Respondent's Appeal. On August 22, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

On September 2, 2005, I issued a Decision and Order: (1) concluding Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to sellers of the agreed purchase prices for perishable agricultural commodities which Respondent purchased, received, and accepted in interstate and foreign commerce; and (2) ordering the publication of the facts and circumstances of Respondent's violations.[2]

On October 12, 2005, Respondent filed a Petition to Reconsider *In re Baiardi Chain Food Corp.*, 64 Agric. Dec. (Sept. 2, 2005). On November 4, 2005, Complainant filed Complainant's Response to Respondent's Petition. On November 10, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondent's Petition to Reconsider.

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[2] *In re Baiardi Chain Food Corp.*, 64 Agric. Dec. , slip op. at 13, 17, 22 (Sept. 2, 2005).

Complainant's exhibits are designated by "CX." Transcript references are designated by "Tr."

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7--AGRICULTURE

. . . .

CHAPTER 20A--PERISHABLE AGRICULTURAL COMMODITIES

. . . .

§ 499b. Unfair conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

. . . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment

promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction[.] . . .

. . . .

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

. . . .

(e) Alternative civil penalties

In lieu of suspending or revoking a license under this section when the Secretary determines, as provided in section 499f of this title, that a commission merchant, dealer, or broker has violated

section 499b of this title or subsection (b) of this section, the Secretary may assess a civil penalty not to exceed $2,000 for each violative transaction or each day the violation continues. In assessing the amount of a penalty under this subsection, the Secretary shall give due consideration to the size of the business, the number of employees, and the seriousness, nature, and amount of the violation. Amounts collected under this subsection shall be deposited in the Treasury of the United States as miscellaneous receipts.

7 U.S.C. §§ 499b(4), 499h(a), (e).

7 C.F.R.:

TITLE 7--AGRICULTURE

. . . .

SUBTITLE B--REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

CHAPTER I--AGRICULTURAL MARKETING SERVICE (STANDARDS, INSPECTIONS, MARKETING PRACTICES), DEPARTMENT OF AGRICULTURE

. . . .

SUBCHAPTER B--MARKETING OF PERISHABLE AGRICULTURAL COMMODITIES

PART 46--REGULATIONS (OTHER THAN RULES OF PRACTICE) UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930

DEFINITIONS

. . . .

§ 46.2 Definitions.

The terms defined in the first section of the Act shall have the same meaning as stated therein. Unless otherwise defined, the following terms whether used in the regulations, in the Act, or in the trade shall be construed as follows:

. . . .

(aa) *Full payment promptly* is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. "Full payment promptly," for the purpose of determining violations of the Act, means:

. . . .

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted;

. . . .

(11) Parties who elect to use different times of payment than those set forth in paragraphs (aa)(1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then payment within the agreed upon time shall constitute "full

payment promptly": *Provided,* That the party claiming the existence of such an agreement for time of payment shall have the burden of proving it.

7 C.F.R. § 46.2(aa)(5), (11).

CONCLUSIONS BY THE JUDICIAL OFFICER ON RECONSIDERATION

Respondent raises two issues in Respondent's Petition to Reconsider. First, Respondent asserts an approximation of the amount Respondent failed to pay produce sellers violates due process (Respondent's Pet. to Reconsider at 2).

Complainant proved by a preponderance of the evidence[3]

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[3] Complainant, as the proponent of an order, has the burden of proof in this proceeding conducted under the Administrative Procedure Act (5 U.S.C. § 556(d)). The standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act is the preponderance of the evidence standard. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981). It has long been held that the standard of proof in administrative disciplinary proceedings conducted under the PACA is preponderance of the evidence. *In re Hunts Point Tomato Co.*, 64 Agric. Dec. , slip op. at 22 n.5 (Nov. 2, 2005); *In re PMD Produce Brokerage Corp.* 60 Agric. Dec. 780, 794 n.4 (2001) (Decision on Remand), *aff'd*, No. 02-1134, 2003 WL 211860247 (D.C. Cir. May 13, 2003); *In re Mangos Plus, Inc.*, 59 Agric. Dec. 392, 399 n.2 (2000), *appeal voluntarily dismissed*, No. 00-1465 (D.C. Cir. Aug. 15, 2001); *In re Sunland Packing House Co.*, 58 Agric. Dec. 543, 566-67 (1999); *In re Produce Distributors, Inc.* (Decision as to Irene T. Russo, d/b/a Jay Brokers), 58 Agric. Dec. 506, 534-35 (1999), *aff'd sub nom. Russo v. United States Dep't of Agric.*, 199 F.3d 1323 (Table), 1999 WL 1024094 (2d Cir. 1999), *printed in* 58 Agric. Dec. 999 (1999), *cert. denied*, 531 U.S. 928 (2000); *In re JSG Trading Corp.* (Decision as to JSG Trading Corp., Gloria & Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile), 57 Agric. Dec. 640, 685-86 (1998), *remanded*, 176 F.3d 536 (D.C. Cir. 1999), *final decision on remand*, 58 Agric. Dec. 1041 (1999), *aff'd*, 235 F.3d 608 (D.C. Cir.), *cert. denied*, 534 U.S. 992 (2001); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1893 (1997), *aff'd*, 178 F.3d 743 (5th Cir.), *cert. denied*, 528 U.S. 1021 (1999); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 917, 927 (1997), *aff'd*, 166 F.3d 1200 (Table), 1998 WL 863340 (2d Cir. 1998), *cert. denied*, 526 U.S. 1098 (1999); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1021 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1247 n.2 (1996), *aff'd*, 136 F.3d 89 (2d Cir. 1997); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1269

and I found that, during the period March 2000 through January 2001, Respondent failed to make full payment promptly to 67 sellers of the agreed purchase prices in the total amount of $830,728.39 for 343 lots of perishable agricultural commodities which Respondent had purchased, received, and accepted in intestate and foreign commerce (CX 5-CX 72; Tr. 38-43). *In re Baiardi Chain Food Corp.*, 64 Agric. Dec. , slip op. at 10-11 (Sept. 2, 2005). Thus, I reject Respondent's assertion that the amount Complainant

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(1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997), *cert. denied sub nom. Heimann v. Department of Agric.*, 522 U.S. 951 (1997); *In re John J. Conforti*, 54 Agric. Dec. 649, 659 (1995), *aff'd in part & rev'd in part*, 74 F.3d 838 (8th Cir. 1996), *cert. denied*, 519 U.S. 807 (1996); *In re DiCarlo Distributors, Inc.*, 53 Agric. Dec. 1680, 1704 (1994), *appeal withdrawn*, No. 94-4218 (2d Cir. June 21, 1995); *In re Boss Fruit & Vegetable, Inc.*, 53 Agric. Dec. 761, 792 (1994), *appeal dismissed*, No. 94-70408 (9th Cir. Nov. 17, 1994); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 617 (1993); *In re Lloyd Myers Co.*, 51 Agric. Dec. 747, 757 (1992), *aff'd*, 15 F.3d 1086, 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36--3), *printed in* 53 Agric. Dec. 686 (1994); *In re Tipco, Inc.*, 50 Agric. Dec. 871, 872-73 (1991), *aff'd per curiam*, 953 F.2d 639, 1992 WL 14586 (4th Cir.), *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, 506 U.S. 826 (1992); *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169, 1191-92 (1990), *aff'd per curiam*, 945 F.2d 398, 1991 WL 193489 (4th Cir. 1991), *printed in* 50 Agric. Dec. 1839 (1991), *cert. denied*, 503 U.S. 970 (1992); *In re Valencia Trading Co.*, 48 Agric. Dec. 1083, 1091 (1989), *appeal dismissed*, No. 90-70144 (9th Cir. May 30, 1990); *In re McQueen Bros. Produce Co.*, 47 Agric. Dec. 1462, 1468 (1988), *aff'd*, 916 F.2d 715, 1990 WL 157022 (7th Cir. 1990); *In re Perfect Potato Packers, Inc.*, 45 Agric. Dec. 338, 352 (1986); *In re Tri-County Wholesale Produce Co.*, 45 Agric. Dec. 286, 304 n.16 (1986), *aff'd per curiam*, 822 F.2d 162 (D.C. Cir. 1987), *reprinted in* 46 Agric. Dec. 1105 (1987).

proved and I found Respondent failed to pay its produce sellers in accordance with the prompt payment provision in section 2(4) of the PACA (7 U.S.C. § 499b(4)), was approximated.

Further, I disagree with Respondent's assertion that Complainant was required to prove and I was required to find the exact amount that remained unpaid to Respondent's produce sellers. The United States Department of Agriculture's "slow-pay-no-pay" policy merely requires that I determine whether a respondent is in full compliance with the PACA within 120 days after the Hearing Clerk serves the respondent with the complaint or the date of the hearing, if that occurs first. In any PACA disciplinary proceeding in which it is shown that a respondent has failed to pay in accordance with the PACA and is not in full compliance with the PACA within 120 days after the complaint is served on that respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "no-pay" case. In any PACA disciplinary proceeding in which it is shown that a respondent has failed to pay in accordance with the PACA, but is in full compliance with the PACA within 120 days after the complaint is served on that respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "slow-pay" case. Full compliance requires that a respondent have paid all produce sellers in full.

The Hearing Clerk served Respondent with the Complaint on August 8, 2001.[4] Complainant proved by a preponderance

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[4] United States Postal Service Domestic Return Receipt for Article Number 7099 3400 0014 4579 1546.

of the evidence[5] and I found that, in March 2002, Respondent owed at least nine produce sellers listed in the Complaint $342,906.75 for produce and, in November 2003, Complainant owed at least seven produce sellers listed in the Complaint $166,426.18 for produce (CX 74, CX 77; Tr. 57, 64-65). *In re Baiardi Chain Food Corp.*, 64 Agric. , slip op. at 8, 11 (Sept. 2, 2005). Thus, Respondent was not in full compliance with the PACA within 120 days after the Hearing Clerk served Respondent with the Complaint. In accordance with the United States Department of Agriculture's "slow-pay-no-pay" policy, this case is a "no-pay" case. Complainant was not required to prove and I was not required to find the exact number of unpaid produce sellers and the exact amount Respondent owed each produce seller in March 2002 and in November 2003 in order to determine that this case is a "no-pay" case, as Respondent contends.

Second, Respondent contends I misapprehended *American Banana Co. v. Republic Bank of New York*, 362 F.3d 33 (2d Cir. 2004). Respondent contends *American Banana* holds that a produce seller may opt out of the prompt payment provisions of the PACA by agreeing to extend payment terms beyond 30 days and the agreement may be oral or written and may occur before or after the produce transaction. (Respondent's Pet. to Reconsider at 3.)

I reject Respondent's contention that the prompt payment provision of section 2(4) of the PACA (7 U.S.C. § 499b(4)) is inapplicable to a transaction in which a produce buyer and produce seller agree to extend the time for payment after the transaction, which is the subject of the extension. Section 46.2(aa) of the Regulations (7 C.F.R. § 46.2(aa)) defines the

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[5] See note 3.

term *full payment promptly* for purposes of determining violations of the prompt payment provision in section 2(4) of the PACA (7 U.S.C. § 499b(4)). Section 46.2(aa)(5) of the Regulations (7 C.F.R. § 46.2(aa)(5)) provides payment for produce must be made within 10 days after the day on which the produce is accepted. Section 46.2(aa)(11) of the Regulations (7 C.F.R. § 46.2(aa)(11)) provides that parties to a produce transaction may elect to use a different time for payment; however, *the parties must reduce their agreement to writing before entering into the transaction* and must maintain a copy of the agreement in their records. Further, the party claiming the existence of the agreement to use a different time for payment has the burden of proving the existence of the agreement. Respondent did not introduce any evidence to show that Respondent entered into a written agreement with the produce sellers listed in the Complaint before the transactions, which are the subject of this proceeding.

I have re-read *American Banana Co. v. Republic Bank of New York,* 362 F.3d 33 (2d Cir. 2004). I find *American Banana* inapposite. The Court in *American Banana* held, if a produce seller enters into a pre-transaction or post-default oral or written agreement extending the time for payment beyond the 30-day maximum allowed to qualify for coverage under the PACA trust, the produce seller loses PACA trust protection. *American Banana* offers no support for Respondent's contention that the prompt payment provision of section 2(4) of the PACA (7 U.S.C. § 499b(4)) is inapplicable to a transaction in which a produce buyer and produce seller agree to extend the time for payment after the transaction, which is the subject of the extension.

For the foregoing reasons and the reasons set forth in *In re Baiardi Chain Food Corp.*, 64 Agric. Dec. (Sept. 2, 2005), Respondent's Petition to Reconsider is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely-filed petition to reconsider. Respondent's Petition to Reconsider was timely-filed and automatically stayed *In re Baiardi Chain Food Corp.*, 64 Agric. Dec. (Sept. 2, 2005). Therefore, since Respondent's Petition to Reconsider is denied, I hereby lift the automatic stay, and the Order in *In re Baiardi Chain Food Corp.*, 64 Agric. Dec. (Sept. 2, 2005), is reinstated; except that the effective date of the Order is the date indicated in the Order in this Order Denying Petition to Reconsider.

For the foregoing reasons, the following Order should be issued.

ORDER

Respondent has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The facts and circumstances of Respondent's violations shall be published. The publication of the facts and circumstances of Respondent's violations shall be effective 60 days after service of this Order on Respondent.

RIGHT TO JUDICIAL REVIEW

Respondent has the right to seek judicial review of the Order in this Order Denying Petition to Reconsider in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Respondent must seek

judicial review within 60 days after entry of the Order in this Order Denying Petition to Reconsider.[6] The date of entry of the Order in this Order Denying Petition to Reconsider is November 15, 2005.

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[6] See 28 U.S.C. § 2344.

APPENDIX D

UNITED STATES DEPARTMENT OF AGRICULTURE

PACA Docket No. D-01-0023

[Filed September 2, 2005]

In re: BAIARDI CHAIN FOOD CORP.)
)

Initial decision issued by Marc R. Hillson, Chief Administrative Law Judge

Decision and Order issued by William G. Jenson, Judicial Officer

OPINION: PROCEDURAL HISTORY

Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on August 2, 2001. Complainant instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the

Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that Baiardi Chain Food Corp. [hereinafter Respondent], during the period March 2000 through January 2001, failed to make full payment promptly to 67 sellers of the agreed purchase prices in the total amount of $830,728.39 for 343 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate and foreign commerce, in willful violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶¶III-IV). On October 23, 2001, Respondent filed an Answer denying the material allegations of the Complaint (Answer ¶¶3-4).

On February 2, 2004, and May 25, 2004, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] presided over a hearing in New York, New York. David A. Richman, Office of the General Counsel, United States Department of Agriculture, represented Complainant.[1] Paul T. Gentile, Gentile & Dickler, New York, New York, represented Respondent.

On July 30, 2004, Complainant filed Complainant's Proposed Findings of Fact, Conclusions and Order, and on September 10, 2004, Respondent filed Respondent's Proposed Findings of Fact and Conclusions of Law. On October 4, 2004, Complainant filed Complainant's Reply Brief.

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[1] On October 4, 2004, Jeffrey J. Armistead entered an appearance on behalf of Complainant, replacing David A. Richman as counsel for Complainant (Notice of Appearance, filed October 4, 2004).

On April 8, 2005, the Chief ALJ issued a Decision [hereinafter Initial Decision] in which the Chief ALJ: (1) concluded Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to sellers of the agreed purchase prices for perishable agricultural commodities which Respondent purchased, received, and accepted in interstate and foreign commerce; and (2) ordered the publication of the facts and circumstances of Respondent's violations.

On July 27, 2005, Respondent appealed to the Judicial Officer. On August 16, 2005, Complainant filed Complainant's Response to Respondent's Appeal. On August 22, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with the Chief ALJ's Initial Decision. Therefore, except for minor modifications, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the Chief ALJ's Initial Decision as the final Decision and Order. Additional conclusions by the Judicial Officer follow the Chief ALJ's discussion, as restated.

Complainant's exhibits are designated by "CX." Respondent's exhibits are designated by "RX." Transcript references are designated by "Tr."

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7--AGRICULTURE

. . . .

CHAPTER 20A--PERISHABLE AGRICULTURAL COMMODITIES

. . . .

§ 499b. Unfair conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

. . . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform

any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction[.] . . .

. . . .

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

. . . .

(e) Alternative civil penalties

In lieu of suspending or revoking a license under this section when the Secretary determines, as provided in section 499f of this title, that a commission merchant, dealer, or broker has violated section 499b of this title or subsection (b) of this section, the Secretary may assess a civil penalty not to exceed $2,000 for each violative transaction or each

day the violation continues. In assessing the amount of a penalty under this subsection, the Secretary shall give due consideration to the size of the business, the number of employees, and the seriousness, nature, and amount of the violation. Amounts collected under this subsection shall be deposited in the Treasury of the United States as miscellaneous receipts.

7 U.S.C. §§ 499b(4), 499h(a), (e).

7 C.F.R.:

TITLE 7--AGRICULTURE

. . . .

SUBTITLE B--REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

CHAPTER I--AGRICULTURAL MARKETING SERVICE (STANDARDS, INSPECTIONS, MARKETING PRACTICES), DEPARTMENT OF AGRICULTURE

. . . .

SUBCHAPTER B--MARKETING OF PERISHABLE AGRICULTURAL COMMODITIES

PART 46--REGULATIONS (OTHER THAN RULES OF PRACTICE) UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930

DEFINITIONS

. . . .

§ 46.2 Definitions.

The terms defined in the first section of the Act shall have the same meaning as stated therein. Unless otherwise defined, the following terms whether used in the regulations, in the Act, or in the trade shall be construed as follows:

. . . .

(aa) *Full payment promptly* is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. "Full payment promptly," for the purpose of determining violations of the Act, means:

. . . .

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted;

. . . .

(11) Parties who elect to use different times of payment than those set forth in paragraphs (aa)(1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then payment within the agreed upon time shall constitute "full payment promptly": *Provided,* That the party claiming

the existence of such an agreement for time of payment shall have the burden of proving it.

7 C.F.R. § 46.2(aa)(5), (11).

CHIEF ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS RESTATED)

Decision

I find Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to sellers of the agreed purchase prices for perishable agricultural commodities which Respondent purchased, received, and accepted in interstate and foreign commerce.

Factual Background

Respondent is a corporation that was licensed under the PACA from June 8, 1948, until its PACA license terminated when Respondent failed to pay the annual PACA license renewal fee on June 8, 2001. David Axelrod was the president, director, and 100 percent stockholder of Respondent from at least 1998 until Respondent's PACA license terminated. (Tr. at 34-35; CX 1.) Complainant received a number of reparation complaints, generated by Respondent's alleged nonpayment for produce, between October 2000 and January 2001, and began an investigation of Respondent in early January 2001 (Tr. at 34). Carolyn Shelby, a marketing specialist employed by the United States Department of Agriculture, personally conducted the investigation and met with David Axelrod on January 8, 2001 (Tr. at 38). David Axelrod produced an "entire sack of

unpaid invoices" and confirmed that the invoices related to "past due and unpaid produce transactions" (Tr. at 41-42). These unpaid invoices involved 67 different produce sellers and 343 separate transactions, and totaled $830,728.39 (CX 5-CX 71). David Axelrod also provided Carolyn Shelby a copy of Respondent's accounts payable aging (Tr. at 42-43; CX 72). After Carolyn Shelby copied the records and returned the originals to David Axelrod, he confirmed that Respondent's unpaid invoice records were accurate (Tr. at 41-42).

Carolyn Shelby conducted two brief follow-up investigations in March 2002 and November 2003, in which she contacted several of Respondent's produce sellers to determine whether Respondent still owed them money. In March 2002, employees or agents of nine produce sellers listed in the Complaint told Carolyn Shelby that Respondent still owed them $342,906.75 for produce. In November 2003, employees or agents of seven produce sellers listed in the Complaint told Carolyn Shelby that Respondent still owed them $166,426.18 for produce. (Tr. at 57, 64-65; CX 74, CX 77.)

Many of Respondent's produce sellers eventually received partial payment. Thus, while, at the time of Carolyn Shelby's January 2001 investigation, Respondent owed Agrexco (USA), Ltd., $21,100 for produce, a portion of the debt, $11,791.45, was paid to Agrexco (USA), Ltd., in 2002. This amount was paid by Summit Business Capital Corporation, which apparently had the rights to Respondent's receivables and was involved in using Respondent's remaining assets to pay part of Respondent's debt now that Respondent was no longer engaged in the produce business. The remainder of Respondent's debt to Agrexco (USA), Ltd., has never been paid. (Tr. at 14-15, 24-25.)

Richard Byllote testified that, on January 17, 2001, his company, Nathel & Nathel, Inc., formerly Wishnatzki & Nathel, Inc., agreed to accept payment of approximately 50 cents on the dollar to resolve Respondent's indebtedness to his company. Richard Byllote testified that this settlement was appropriate because he knew Respondent was having financial difficulties and, if he did not accept foregoing half the debt, he thought Respondent would not pay Wishnatzki & Nathel, Inc., anything. The agreement between the Respondent and Wishnatzki & Nathel, Inc., stated "Baiardi is closing its doors for business." (CX 78.) Respondent owed Wishnatzki & Nathel, Inc., approximately $30,000, of which Respondent paid $14,861 in accord with this agreement. (Tr. at 121-26; CX 78.)

At the hearing, Respondent called no witnesses, but rather presented its case through cross-examination of Complainant's witnesses. All of Respondent's exhibits were likewise admitted through cross-examination, so the record does not contain any direct Respondent testimony as to the preparation and meaning of Respondent's exhibits. Most of Respondent's exhibits were the final settlements of claims against Respondent based on Respondent's representation that it was going out of business and constituted settlements in the general range of 50 cents for each dollar Respondent owed to each produce seller with whom such an agreement was executed. While counsel for Complainant voiced a continuing objection to the admission of these documents without a witness to vouch for their authenticity (and be subject to cross-examination as to the information contained in the documents), I have no basis to doubt that the documents constitute agreements with numerous produce sellers to settle claims for less than the original purchase prices.

Findings of Fact

1. Respondent is a corporation that was organized and existing under the State of New York at the time of the transactions set forth in the Complaint (Compl. ¶II(a); Answer ¶2). Respondent held PACA license 114748 from June 8, 1948, until Respondent's PACA license terminated on June 8, 2001, for failure to pay the required PACA license renewal fee (Compl. ¶II(b); Answer ¶2).

2. Complainant conducted an investigation of Respondent after receiving complaints that Respondent was not paying for perishable agricultural commodities. As part of this investigation, Carolyn Shelby, a marketing specialist employed by the United States Department of Agriculture, went to Respondent's place of business on January 8, 2001, and requested copies of Respondent's business records. David Axelrod, president, director, and 100 percent stockholder of Respondent, provided the requested records to Carolyn Shelby on January 11, 2001.

3. The records, which David Axelrod represented were accurate, demonstrated that, during the period March 2000 through January 2001, Respondent failed to make full payment promptly to 67 sellers of the agreed purchase prices in the total amount of $830,728.39 for 343 lots of perishable agricultural commodities which Respondent had purchased, received, and accepted in intestate and foreign commerce.

4. In March 2002, and again in November 2003, Carolyn Shelby contacted several produce sellers listed in the Complaint to ascertain whether Respondent still owed the produce sellers money for produce. In March 2002, employees or agents of nine produce sellers listed in the Complaint told Carolyn Shelby that Respondent still owed

them $342,906.75 for produce. In November 2003, employees or agents of seven produce sellers listed in the Complaint told Carolyn Shelby that Respondent still owed them $166,426.18 for produce. (Tr. at 64-65; CX 74, CX 77.)

5. Carolyn Shelby's January 2001 investigation revealed Respondent owed Coronet Foods, Inc., $50,887.35 for produce (CX 5, CX 27). On January 29, 2001, Coronet Foods, Inc., entered into an agreement with Respondent in which Coronet Foods, Inc., agreed to accept $31,328 in full satisfaction of the $50,887.35 Respondent owed to Coronet Foods, Inc. Respondent paid Coronet Foods, Inc., $14,000. (RX 20-RX 22, RX 25-RX 27.)

6. Carolyn Shelby's January 2001 investigation revealed Respondent owed Wishnatzki & Nathel, Inc., $26,070 for produce (CX 5, CX 41). On January 17, 2001, Wishnatzki & Nathel, Inc., agreed to accept approximately 50 percent of the amount Respondent owed to Wishnatzki & Nathel, Inc., for produce (Tr. at 121, 125-26; CX 78).

7. Carolyn Shelby's January 2001 investigation revealed Respondent owed Agrexco (USA), Ltd., $21,100 for produce (CX 5, CX 11). Summit Business Capital Corporation, which had legal rights to Respondent's accounts receivable, paid Agrexco (USA), Ltd., $11,791.45 of the amount owed by Respondent. At the time of the commencement of the hearing, on February 2, 2004, Respondent had not paid the balance owed to Agrexco (USA), Ltd. (Tr. at 14-15).

8. Representing that it was going out of business, Respondent settled a number of its accounts with produce sellers listed in the Complaint by paying approximately 50 cents for each dollar Respondent owed. At least two other

accounts were settled through court dispositions. There is no evidence that Respondent made full payment promptly to any sellers listed in the Complaint of the agreed purchase prices of the perishable agricultural commodities which Respondent purchased, received, and accepted in interstate and foreign commerce.

Discussion

Respondent Willfully, Flagrantly, and Repeatedly Violated the PACA by Failing to Make Full Payment Promptly to 67 Produce Sellers Listed in the Complaint

Respondent's contentions that its agreements with produce sellers to settle claims for less than the agreed purchase prices is the equivalent of an "opting-out" of the requirements of PACA is inconsistent with both the PACA and the clear, long-standing case law that governs these matters. While the appropriate penalty for Respondent's willful, flagrant, and repeated violations of the prompt payment provision of section 2(4) of the PACA (7 U.S.C. § 499b(4)) would normally be revocation of Respondent's PACA license, Respondent's PACA license has already been terminated for failure to pay the PACA license renewal fee. Thus, a finding that Respondent has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and the publication of the facts and circumstances of Respondent's violations, is the only appropriate remedy.

Respondent Failed to Pay Promptly 67 Produce Sellers the Agreed Purchase Prices for Perishable Agricultural Commodities

There is no legitimate dispute that Respondent failed to make full payment promptly to 67 sellers of the agreed

purchase prices of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate and foreign commerce. Each of the 67 sellers was identified by David Axelrod as having unpaid invoices at the time of Carolyn Shelby's January 2001 investigation. Respondent has demonstrated that six of the 67 produce sellers listed in the Complaint signed "work out agreements" with Respondent, where payment of approximately 50 cents on the dollar was agreed to settle their claims and that claims of two other produce sellers were resolved by court dispositions. Many of the other exhibits submitted by Respondent appear to be similar settlements with a number of the other produce sellers to which Respondent owed payment for produce. Respondent contends these agreements to accept reduced payments on a delayed basis, made after Respondent had been delinquent in its produce payments and in the face of Respondent's decision to close the business, take these transactions out of the scope of the PACA (Respondent's Proposed Findings of Fact and Conclusions of Law at 4-5).

The lead case in determining whether a purchaser of perishable agricultural commodities is subject to the PACA sanctions for failure to pay promptly is *In re Scamcorp, Inc.*, 57 Agric. Dec. 527 (1998). The Judicial Officer announced in *Scamcorp* that he was distinguishing "slow-pay" cases from "no-pay" cases. In cases in which a respondent failed to achieve "full compliance" with the PACA within 120 days after service of the complaint, or the date of the hearing, if that comes first, the violation would be treated as a "no-pay" case and, in the case of flagrant or repeated violations, the violator's PACA license would be revoked. *Id.* at 548-49.

Agreements to Change the Terms of Payment Subsequent to the Initial Transaction Do Not Negate the PACA's Prompt Payment Provisions

While Respondent contends the work-out agreements allow Respondent to escape PACA sanctions, the case law holds squarely to the contrary. As the Judicial Officer stated in *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 619 (1993), "it has been repeatedly held that a seller's agreement to accept partial payment because of the buyer's insolvency does not constitute full payment or negate a violation of the PACA." While parties are free to negotiate alternatives to the time within which payment is due, the Regulations specify the agreement must be reached before entering into the transaction and the agreement must be in writing. 7 C.F.R. § 46.2(aa)(11). Respondent's contention that a produce seller's choice to accept half payment, when the other choice is to accept no payment at all, renders the situation not governable by the PACA and the debtor not subject to disciplinary action, is not consistent with the PACA, the Regulations, or case law. Indeed, the type of situation faced by Respondent's produce sellers--accepting half payment or nothing--is just the type of situation the PACA was designed to prevent.

The same logic applies to matters resolved in litigation. There is no authority to support Respondent's contention that, because Agrexco (USA), Ltd., and Ocean Mist Farms may have received partial payment of the debt owed them by Respondent as a result of litigation, the prompt payment provision of section 2(4) of the PACA (7 U.S.C. § 499b(4)) ceases to apply to those transactions.

The Unpaid Balance Is Substantial

Respondent's contention that the unpaid balance is de minimus and only warrants the assessment of a civil penalty is likewise without basis. There is no evidence that Respondent made full payment promptly of the agreed purchase prices to any of the 67 produce sellers listed in the Complaint. At the time of Carolyn Shelby's January 2001 investigation, Respondent's president, director, and 100 percent stockholder supplied the very list of unpaid produce sellers Complainant is relying upon and affirmed that the records, which indicate Respondent owed 67 produce sellers $830,728.39, are accurate. That many of these claims were settled at 50 cents on the dollar does not negate Respondent's violations of the prompt payment provision of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Even if all payments were made under the work-out agreements, and even with the two court "dispositions," a substantial amount of the $830,728.39 in non-payments alleged in the Complaint remains unpaid. Respondent's contention that only around $30,000 remains unpaid assumes that the work-out agreements and two court dispositions nullify all remaining debt. However, other than introducing a large packet of documents that indicate that a number of claims were settled for 50 cents on the dollar, Respondent has adduced no evidence to counter the testimony of Complainant's witnesses and the statement of Respondent's president, director, and 100 percent stockholder that none of the 67 produce sellers were fully and promptly paid.

Respondent's Violations Are Willful, Flagrant, and Repeated

In PACA cases, a violation need not be accompanied by evil motive to be regarded as willful. Rather, if a person "intentionally does an act prohibited by a statute or if a person

carelessly disregards the requirements of a statute," his acts are regarded as willful. *In re Frank Tambone, Inc.*, 53 Agric. Dec. 703, 714 (1994). Here, where Respondent continued to order and receive, and not pay for, produce for months, until it closed its doors in January 2001, putting numerous produce sellers at risk, Respondent was "clearly operating in disregard of the payment requirements of the PACA," *id.*, and has committed willful violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

In determining whether a violation is flagrant, the Judicial Officer has factored in the number of violations, the amount of money involved, and the length of time during which the violations occurred. *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 551 (1998). *Scamcorp,* as well as numerous other cases, involved fewer transactions with fewer produce sellers for a lesser amount of money than is involved in the instant case, and in each of those cases, the violations were found to be flagrant. The flagrant nature of the violations is exacerbated by the 10-month period of time over which Respondent's violations occurred, and the repeated nature of Respondent's violations is established by the 343 occurrences.

A Significant Penalty Is Warranted

Normally, in light of Respondent's willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), Respondent's PACA license would be revoked. Here, with Respondent's PACA license already terminated, the only appropriate sanction is the publication of the facts and circumstances of Respondent's willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises three issues in its Appeal Petition. First, Respondent contends the Chief ALJ erroneously failed to determine the exact number of unpaid produce sellers and the exact amount Respondent failed to pay to these produce sellers. Respondent contends "the amount of unpaid PACA governed accounts amounts to less than $30,000." (Respondent's Appeal Pet. at 1-4.)

The Chief ALJ found, during the period March 2000 through January 2001, Respondent failed to make full payment promptly to 67 sellers of the agreed purchase prices in a total amount over $830,000 for 343 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate and foreign commerce (Initial Decision at 6). This finding alone is sufficient to conclude that Respondent violated the prompt payment provision in section 2(4) of the PACA (7 U.S.C. § 499b(4)). I reject Respondent's contention that the Chief ALJ was somehow required to find that the exact amount Respondent failed to pay in accordance with the PACA was "$830,728.39."

Moreover, the Chief ALJ addressed Respondent's contention that, at the time of the hearing, only $30,000 remained unpaid, as follows:

> . . . The contention that the unpaid balance is de minimus and only warrants civil penalties is likewise without basis. There is no evidence in the record that any of the 67 creditors were paid either timely or in full for the original amount that was due for the perishable produce. Witnesses testified that at the time

> of the initial investigation, Respondent's president supplied the very list of creditors that the PACA Branch is relying upon, and affirmed that the records, which indicated that 67 creditors were owed over $830,000 by Respondent, were accurate. That many of these claims were settled at 50 cents on the dollar does not render the delinquent amount acceptable under PACA regulations. Even if all payments were made under the work-out agreements, and even with the two court "dispositions," over $570,000 of the $830,000 in non-payments alleged in the complaint remains unpaid. Respondent's contention that only around $30,000 remains unpaid assumes that the work-out agreements and two court dispositions nullify all remaining debt. However, other than introducing a large packet of documents that indicate that a number of claims were settled for 50 cents on the dollar, Respondent has adduced no evidence to counter the testimony of the PACA witnesses, and the statement of its president, that apparently none of the 67 creditors were fully paid in a timely manner.

Initial Decision at 9-10.

Again I find the Chief ALJ's approximation of the amount that remained unpaid at the time of the hearing ("over $570,000 of the $830,000") sufficient. The Chief ALJ was not required to calculate the exact amount that Respondent still owed produce sellers at the commencement of the hearing.

Second, Respondent contends the prompt payment provision in section 2(4) of the PACA (7 U.S.C. § 499b(4)) is not applicable to transactions in which the produce buyer and produce seller agree to extend the time for payment.

Respondent contends an agreement to extend the time for payment may be written or oral and may be made before or after the transaction, which is the subject of the extension. Respondent cites *American Banana Co. v. Republic Bank of New York*, 362 F.3d 33 (2d Cir. 2004), as support for this contention. (Respondent's Appeal Pet. at 5-6.)

I reject Respondent's contention that the prompt payment provision of section 2(4) of the PACA (7 U.S.C. § 499b(4)) is inapplicable to a transaction in which a produce buyer and produce seller agree to extend the time for payment after the transaction, which is the subject of the extension. Section 46.2(aa) of the Regulations (7 C.F.R. § 46.2(aa)) defines the term *full payment promptly* for purposes of determining violations of the prompt payment provision in section 2(4) of the PACA (7 U.S.C. § 499b(4)). Section 46.2(aa)(5) of the Regulations (7 C.F.R. § 46.2(aa)(5)) provides payment for produce must be made within 10 days after the day on which the produce is accepted. Section 46.2(aa)(11) of the Regulations (7 C.F.R. § 46.2(aa)(11)) provides that parties to a produce transaction may elect to use a different time for payment; however, *the parties must reduce their agreement to writing before entering into the transaction* and must maintain a copy of the agreement in their records. Further, the party claiming the existence of the agreement to use a different time for payment has the burden of proving the existence of the agreement. Respondent did not introduce any evidence to show that Respondent entered into a written agreement with the produce sellers listed in the Complaint before the transactions, which are the subject of this proceeding.

Moreover, I find *American Banana Co. v. Republic Bank of New York*, 362 F.3d 33 (2d Cir. 2004), inapposite. The Court in *American Banana Co.* held, if a produce seller enters

into a pre-transaction or post-default oral or written agreement extending the time for payment beyond the 30-day maximum allowed to qualify for coverage under the PACA trust, the produce seller loses PACA trust protection. *American Banana Co.* offers no support for Respondent's contention that the prompt payment provision of section 2(4) of the PACA (7 U.S.C. § 499b(4)) is inapplicable to a transaction in which a produce buyer and produce seller agree to extend the time for payment after the transaction, which is the subject of the extension.

Third, Respondent contends, based on Respondent's substantial efforts to pay its produce sellers, the only sanction warranted is a civil monetary penalty (Respondent's Appeal Pet. at 7).

Section 8 of the PACA (7 U.S.C. § 499h) provides, whenever the Secretary of Agriculture determines a commission merchant, dealer, or broker has flagrantly or repeatedly violated section 2 of the PACA (7 U.S.C. § 499b), the Secretary of Agriculture may publish the facts and circumstances of the violation, revoke the violator's PACA license, suspend the violator's PACA license, or assess the violator a civil monetary penalty. However, I have long held that a civil penalty is not appropriate in a "no-pay" case. "No-pay" cases include cases in which it is shown that a respondent has failed to pay in accordance with the PACA and is not in full compliance with the PACA within 120 days after the complaint is served on that respondent, or the date of the hearing, whichever occurs first.[2] As discussed in this Decision and Order, *supra,* the record establishes that

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[2] *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 549 (1998).

Respondent failed to make full payment promptly in accordance with section 2(4) of the PACA (7 U.S.C. § 499b(4)). The Hearing Clerk served Respondent with the Complaint on August 8, 2001,[3] and the hearing commenced February 2, 2004.[4] Therefore, in order to avoid classification of this proceeding as a "no-pay" case, Respondent must have been in full compliance with the PACA no later than December 8, 2001. The record establishes that Respondent failed to make full payment to all produce sellers identified in the Complaint by December 8, 2001. Therefore, a civil monetary penalty is not justified by the facts in this proceeding.

For the foregoing reasons, the following Order should be issued.

ORDER

Respondent has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The facts and circumstances of Respondent's violations shall be published.

The publication of the facts and circumstances of Respondent's violations shall be effective 60 days after service of this Order on Respondent.

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[3] United States Postal Service Domestic Return Receipt for Article Number 7099 3400 0014 4579 1546.

[4] Tr. at 1, 3.

APPENDIX E

UNITED STATES DEPARTMENT OF AGRICULTURE

PACA Docket No. D-01-0023

[Filed April 8, 2005]

PERISHABLE AGRICULTURAL COMMODITIES ACT	)
In re: BAIARDI CHAIN FOOD CORP.	)

Decision and Order by Chief Administrative Law Judge Marc R. Hillson

Decision and Order

Decision

In this decision, I find that Respondent Baiardi Chain Food Corp. (Baiardi) committed willful, repeated and flagrant violations of section 2(4) of the Perishable Agricultural Commodities Act (PACA), by its failure to fully and promptly pay its suppliers of perishable agricultural commodities.

Procedural History

On August 1, 2001, a complaint was issued by the Associate Deputy Administrator, Fruit and Vegetable

Programs, Agricultural Marketing Service against Respondent, alleging that Respondent had committed multiple violations of section 2(4) of the PACA. In particular, the complaint charged respondent with failure to make full payment promptly to 67 sellers in the amount of over $830,000 for 343 lots of perishable agricultural commodities. Respondent filed an answer, denying the violations, on October 15, 2001. On May 31, 2002, Complainant filed a Motion for an Order Requiring Respondent to Show Cause Why a Decision Without Hearing Should Not be issued. In its July 17, 2002 Opposition to the motion, Respondent contended that it was entitled to a hearing because there were contested issues of fact, and because it had "made payment" and because written agreements took the dispute "outside the jurisdiction of the PACA." Former Chief Judge James Hunt denied the Motion and the matter was set for hearing.

After several postponements and the eventual reassignment of the case to the undersigned judge, a hearing was conducted on February 2, 2004, in New York City. Complainant was represented by David Richman, and Respondent was represented by Paul Gentile. The hearing was completed on May 25, 2004.[1] Both parties subsequently filed briefs.

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[1] At the hearing, Complainant presented the testimony of four witnesses. Respondent called no witnesses. Complainant's exhibits (CX) 1-3, 5-72, 74-76, and 78 were admitted. Respondent's exhibits (RX) 1-50, 150-154 were also admitted.

Factual Background

Respondent is a corporation that was licensed under the PACA from June 8, 1948 until its license terminated when it failed to pay the annual renewal fee on June 8, 2001. David Axelrod owned respondent from at least 1998 until the license terminated. CX 1. Complainant received a number of reparation complaints, generated by Baiardi's alleged nonpayment for produce, between October 2000 and January 2001, and so began an investigation of Baiardi in early January 2001. Carolyn Shelby, a marketing specialist with Complainant, personally conducted the investigation and met with Mr. Axelrod on January 8, 2001. Tr. 38. At her request, he produced an "entire sack of unpaid invoices," Tr. 41, and confirmed that each was a "past due and unpaid produce transaction." *Id.* These unpaid invoices involved 67 different companies and 343 separate transactions. CX 5-71, and totaled over $830,000. Axelrod also printed out for Ms. Shelby a copy of Baiardi's accounts payable aging. CX 72. After Ms. Shelby copied the records and returned the originals to Mr. Axelrod, he confirmed that Respondent's unpaid invoice records were accurate. Tr. 41-42.

Ms. Shelby conducted two brief follow-up investigations in March 2002 and November 2003, where she contacted several of Respondent's creditor companies to determine whether Respondent still owed them money. Tr. 64, CX 74, 77. She was told by employees or agents of nine companies in March 2002 that Respondent still owed them over $342,000, and in November 2003 was told by employees or agents of seven companies that Respondent still owed them over $166,000 in unpaid produce transactions. Tr. 65, CX 74, 77.

Many of the creditor companies eventually received partial payment. Thus, while at the time of the initial investigation by Ms. Shelby, Agrexco (USA), Ltd. was owed over $21,000, a portion of the debt, $11,791.45, was paid to Agrexco in 2002. Tr. 14-15, 24-25. This amount was paid by Summit Business Capital Corp., which apparently had the rights to Respondent's receivables, and was involved in using Respondent's remaining assets to pay off part of Respondent's debt now that Respondent was no longer engaged in the produce business. Tr. 14-15. The remainder of the debt has never been paid.

Ira Nathel testified that his company, Wishnatski & Nathel, agreed on January 17, 2001, to accept payment of approximately 50 cents on the dollar to resolve Respondent's indebtedness to his company. He testified that this settlement was appropriate because he knew that Respondent was having financial difficulties and that if he did not accept foregoing half the debt he thought he would not get paid anything by respondent. Tr. 121-26, CX 78. The agreement between the two companies stated that "Baiardi is closing its doors for business." CX 78. The amount owed was approximately $30,000, of which just under $15,000 was paid in accord with this agreement.

At the hearing, Respondent chose to call no witnesses, but rather essentially presented its case through cross-examination of Complainant's witnesses. All of Respondent's exhibits were likewise admitted through cross-examination, so I did not have the benefit of any direct Respondent testimony as to the preparation and meaning of these documents. Most of the documents I admitted were similar to CX 78, in that they were a final settlement of claims against Respondent based on Respondent's representation that it was going out of business, and constituted settlements in the general range of 50 cents

for each dollar owed by Respondent to each creditor with whom such an agreement was executed. While counsel for Complainant voiced a continuing objection to my admitting these documents without a witness to vouch for their authenticity (and be subject to cross-examination as to the information contained in the documents) I have no basis to doubt that they do constitute agreements with numerous creditors to settle claims for a reduced amount in recognition that that was the best deal they could get from Respondent under the circumstances.[2]

Statutory and Regulatory Background

The Perishable Agricultural Commodities Act governs the conduct of transactions in interstate commerce involving perishable agricultural commodities. Among other things, it defines and seeks to sanction unfair conduct in transactions involving perishables. Section 499b provides:

> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:
>
> . .
>
> (4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural

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[2] Interestingly, representatives from several of the creditors told Ms. Shelby that the original amount listed in the complaint were still due, even though in at least several of the cases, the matter had been compromised and presumably paid off (at 50 cents on the dollar) long before the disciplinary case was even filed by PACA.

> commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

7 U.S.C. § 499a(b)4.

When the Secretary of Agriculture determines that a "merchant, dealer or broker has violated any of the provisions of section 499b of this title"

> the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

The regulations define "full payment promptly" and illustrate the default rule for defining prompt payment and when deviation from the default is acceptable.

(aa) *Full payment promptly* is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. "Full payment promptly," for the purpose of determining violations of the Act, means:

. . .

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted;

. . .

(11) Parties who elect to use different times of payment than those set forth in paragraphs (aa) (1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then payment within the agreed upon time shall constitute "full payment promptly": *Provided*, That the party claiming the existence of such an agreement for time of payment shall have the burden of proving it.

7 C.F.R. § 46.2.

Findings of Fact

1. Baiardi Chain Food Corp. (Respondent) is a corporation that was organized and existing under the State of New York at the time of the transactions set forth in the complaint. Complaint, paragraph 2, Answer, paragraph 2. Respondent held PACA license 114748 from June 8, 1948

until the license terminated on June 8, 2001, for failure to pay the required PACA renewal fee.

2. Complainant conducted an investigation of Respondent after receiving complaints that Respondent was not paying for shipments of perishable agricultural commodities. As part of this investigation, Ms. Carolyn Shelby, a marketing specialist for Complainant, went to Respondent's place of business on January 8, 2001 and requested copies of various of Respondent's business records. David Axelrod, president of Respondent, provided the requested records to Ms. Shelby on January 11, 2001.

3. The records, which Axelrod represented were accurate, demonstrated that between the period March 2000 and January 2001 Respondent had received and not paid for 343 lots of perishable agricultural commodities from 67 produce sellers, and that the amount owed was over $830,000.

4. Representing that it was going out of business, Respondent settled a number of its accounts with produce sellers by paying 50 cents for each dollar owed. At least two other accounts were settled through court dispositions. There is no evidence that any sellers were paid, either in a timely fashion or otherwise, the original amounts owed at the time of the purchase of the perishable agricultural commodities.

Discussion

Respondent has violated the PACA willfully, repeatedly and flagrantly by failing to make full payment, promptly, to the 67 sellers of produce listed in the complaint. Respondent's contentions that the agreements to settle claims for a reduced amount are the equivalent of an "opting-out" of the requirements of PACA is inconsistent with both the statute

and the clear, long-standing case law that governs these matters. While the appropriate penalty for such substantial noncompliance would normally include the revocation of the violator's license, Respondent's license has already been terminated for failure to pay its renewal fee. Thus, a finding that Respondent has committed willful, flagrant and repeated violations, and the publication of the facts and circumstances of these violations, is the only appropriate remedy.

Respondent failed to timely pay any of the 67 sellers the initial agreed upon purchase price for perishable agricultural commodities. There is no legitimate dispute that Respondent failed to pay 67 sellers of perishable agricultural commodities the amount that it had originally agreed to pay. Each of the 67 sellers was identified by Mr. Axelrod as having unpaid invoices at the time of Ms. Shelby's investigation. Respondent has demonstrated that six of the 67 creditors signed "work out agreements" with Respondent, where payment of approximately 50 cents on the dollar was agreed to settle their claims, and that at least two other creditors were resolved by other court dispositions. Many of the other exhibits submitted by Respondent appear to be similar settlements with a number of the other companies to which it owed payment for produce, under similar terms. Respondent contends that these agreements to accept reduced payments on a delayed basis, made after it had been delinquent in its produce payments and in the face of its decision to close the business, take these transactions out of the scope of the PACA. Resp. Br. at 4-5.

The lead case in determining whether a purchaser of perishable agricultural commodities is subject to the PACA sanctions for failure to pay promptly is *In re Scamcorp*, 57 Agric. Dec. 527 (1998). The Judicial Officer announced in *Scamcorp* that he was distinguishing "slow-pay" cases, where

generally only civil penalties would be assessed, from "no-pay" cases where in the case of flagrant or repeated violators license revocation would be the appropriate remedy. In the cases of failure to achieve "full compliance" with the PACA within 120 days of service of the complaint, or the date of the hearing, if that comes first, the violation would be treated as a "no-pay" case. *Id.*, at 548-9.

Actions to change the terms and conditions of payment subsequent to the initial transaction do not negate the PACA's prompt payment provisions. While Respondent contends that the work-out agreements allow Respondent to escape PACA sanctions, the case law holds squarely to the contrary. As the Judicial Officer stated in *In re Full Sail Produce*, 52 Agric. Dec. 608, 619 (1993), ". . . it has been repeatedly held that a seller's agreement to accept partial payment because of the buyer's insolvency does not constitute full payment or negate a violation of the PACA." While parties are free to negotiate alternatives to settling within ten days of the transaction, the regulations specify that such terms must be negotiated prior to the transaction, and be in writing. 7 C.F.R. § 46.2 (aa)(11). Respondent's contention that a creditor's choice to accept half-payment, when the other choice is to accept no payment at all, renders the situation not governable by the PACA and the debtor not subject to disciplinary action is not consistent with either the PACA or its underlying regulations, nor is it consistent with the case law. Indeed, the type of situation faced by Respondent's creditors--accepting half payment or nothing--is just the type of situation that the PACA was designed to prevent.

The same logic applies to matters resolved in litigation. There is no authority to support Respondent's contention that because Agrexco and Ocean Mist may have received partial payment of the debt owed them by Respondent as a result of

litigation of these claims due to their non-payment, that the prompt payment provisions of the PACA cease to apply to those transactions.

The unpaid balance is substantial. The contention that the unpaid balance is de minimus and only warrants civil penalties is likewise without basis. There is no evidence in the record that any of the 67 creditors were paid either timely or in full for the original amount that was due for the perishable produce. Witnesses testified that at the time of the initial investigation, Respondent's president supplied the very list of creditors that the PACA Branch is relying upon, and affirmed that the records, which indicated that 67 creditors were owed over $830,000 by Respondent, were accurate. That many of these claims were settled at 50 cents on the dollar does not render the delinquent amount acceptable under PACA regulations. Even if all payments were made under the work-out agreements, and even with the two court "dispositions," over $570,000 of the $830,000 in non-payments alleged in the complaint remains unpaid. Respondent's contention that only around $30,000 remains unpaid assumes that the work-out agreements and two court dispositions nullify all remaining debt. However, other than introducing a large packet of documents that indicate that a number of claims were settled for 50 cents on the dollar, Respondent has adduced no evidence to counter the testimony of the PACA witnesses, and the statement of its president, that apparently none of the 67 creditors were fully paid in a timely manner.

Respondent's Violations are Willful, Flagrant and Repeated. In PACA cases, a violation need not be accompanied by evil motive to be regarded as willful. Rather, if a person "intentionally does an act prohibited by a statute or if a person carelessly disregards the requirements of a statute," his acts are regarded as willful. *In re. Frank*

Tambone, Inc., 53 Agric. Dec. 703 (714-15)(1994). Here, where Respondent continued to order and receive, and not pay for, produce for months, until it closed its doors in January 2001, putting numerous growers and sellers at risk, it was "clearly operat[ing] in disregard of the payment requirements of the PACA," *Id.*, and has committed willful violations.

In determining whether a violation is flagrant, the Judicial Officer and other judges have factored in the number of violations, the amount of money involved, and the length of time during which the violations occurred. *In re. N. Pugatch, Inc.*, 55 Agric. Dec. 581 (1995), *Scamcorp, supra*. Both *Pugatch* and *Scamcorp*, as well as the other cases cited by Complainant in its opening brief at page 15, involved fewer transactions with fewer sellers for a lesser amount of money than is involved in the instant case, and in each of those cases the violations were found to be flagrant. The flagrant nature of the violations is exacerbated by the 10-month period of time over which the violations occurred. And the repeated nature of the violation is established by the 343 occurrences.

Given the nature and number of the violations, a significant penalty is warranted. Normally, under the *Scamcorp* rule, license revocation would be one aspect of the remedy. Here, with Respondent already out of business and the license already terminated, the only appropriate remedy is the finding, which I hereby make, that Respondent, Baiardi Food Chain Corp. has committed willful, flagrant and repeated violations of section 2 (4) of the PACA.

The facts and circumstances of the violations shall be published.

The provisions of this order shall become effective on the first day after this decision becomes final. Unless appealed pursuant to the Rules of Practice at 7 C.F.R. § 1.145(a), this decision becomes final without further proceedings 35 days after service as provided in the Rules of Practice, 7 C.F.R. 1.142(c)(4).

Copies of this decision shall be served upon the parties.

APPENDIX F

TITLE 7. AGRICULTURE
CHAPTER 20A. PERISHABLE AGRICULTURAL COMMODITIES

7 U.S.C. § 499a. Short title and definitions

(a) Short title

This chapter may be cited as the "Perishable Agricultural Commodities Act, 1930."

(b) Definitions

For purposes of this chapter:

(1) The term "person" includes individuals, partnerships, corporations, and associations.

(2) The term "Secretary" means the Secretary of Agriculture.

(3) The term "interstate or foreign commerce" means commerce between any State or Territory, or the District of Columbia and any place outside thereof; or between points within the same State or Territory, or the District of Columbia but through any place outside thereof; or within the District of Columbia.

* * *

(7) The term "broker" means any person engaged in the business of negotiating sales and purchases of any perishable agricultural commodity in interstate or foreign commerce for or on behalf of the vendor or the purchaser, respectively, except that no person shall be deemed to be a "broker" if such person is an independent agent negotiating sales for and on behalf of the vendor and if the only sales of such commodities negotiated by such person are sales of frozen fruits and vegetables having an invoice value not in excess of $ 230,000 in any calendar year.

* * *

7 U.S.C. § 499b. Unfair conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

* * *

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under

section 499e(c)of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

* * *

7 U.S.C. § 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section § 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

* * *

CODE OF FEDERAL REGULATIONS
TITLE 7 -- AGRICULTURE
SUBTITLE B -- REGULATIONS OF THE DEPARTMENT OF AGRICULTURE
CHAPTER I -- AGRICULTURAL MARKETING SERVICE (STANDARDS, INSPECTIONS, MARKETING PRACTICES),
SUBCHAPTER B -- MARKETING OF PERISHABLE AGRICULTURAL COMMODITIES
PART 46 -- REGULATIONS (OTHER THAN RULES OF PRACTICE) UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930
DEFINITIONS

7 C.F.R. 46.2 Definitions.

The terms defined in the first section of the act shall have the same meaning as stated therein. Unless otherwise defined, the following terms whether used in the regulations, in the act, or in the trade shall be construed as follows:

* * *

(aa) "Full payment promptly" is the term used in the act in specifying the period of time for making payment without committing a violation of the act. "Full payment promptly," for the purpose of determining violations of the act, means:

* * *

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted;

* * *

(11) Parties who elect to use different times of payment than those set forth in paragraphs (aa)(1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then payment within the agreed upon time shall constitute "full payment promptly," Provided, That the party claiming the existence of such an agreement for time of payment shall have the burden of proving it.

Nothing in the regulations in this part shall limit the seller's privilege of shipping under a closed or advise bill of lading or other arrangement requiring cash on delivery unless there has been express prior agreement to the contrary between the parties; or prohibit cooperative associations from settling with their members on the basis of seasonal pools or other arrangements provided by their regulations or bylaws. If there is a dispute concerning a transaction, the foregoing time periods for prompt payment apply only to payment of the undisputed amount.

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket Nos. 02-9442(L), 02-9504(XAP)

[Filed March 11, 2004]

AMERICAN BANANA CO., INC., Finest Fruits, Inc., Bronco Produce Corp., Jacobson Produce Corp., Morris Okun, Inc., D.M. Rothman, Inc., Rubin Bros. Produce Corp., Rosenthal & Klein, Inc., Square Produce, Inc., Post & Taback, Inc., A.J. Trucco Corp., and Wishnatzki & Nathel, Inc.,
Plaintiffs-Appellants- Cross-Appellees,

L & P Fruit Corp., H. Schnell & Co., Inc., and Martin Striks & Sons, Inc.,
Plaintiffs,

v.

REPUBLIC NATIONAL BANK OF NEW YORK, N.A.,
Defendant-Third-Party-Plaintiff-Appellee-Cross-Appellant,

Gail Werner, Jack Turano, PMD Produce Brokerage Corp., and Mark Werner,
Third-Party-Defendants.

Before: VAN GRAAFEILAND, CABRANES, and B.D. PARKER, JR., Circuit Judges.

B.D. PARKER, JR., Circuit Judge.

From 1995 to 1996, Plaintiffs-Appellants ("Sellers")[3] sold fruit and other fresh produce to Third-Party Defendant PMD Brokerage Corp. ("PMD"), which maintained a checking account at Defendant Republic National Bank of New York (predecessor of HSBC Bank, USA, and for our purposes, "HSBC"). Such sales are regulated by the Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. §§ 499a-499t. At issue in this appeal is a provision of PACA that requires produce dealers, such as PMD, to hold all perishable agricultural commodities they have purchased on short-term credit, as well as any proceeds from sales of those commodities, in trust for the benefit of the unpaid sellers of the produce until full payment has been made. 7 U.S.C. § 499e(c)(2).

After PMD defaulted on amounts it owed, and the Sellers failed in their efforts to obtain repayment from PMD, the Sellers sued HSBC. They claimed that HSBC's retention of deposits made by PMD to offset PMD's overdraft balance constituted a breach of the PACA trust. After a bench trial, the District Court concluded that HSBC had breached the PACA trust by accepting PMD's deposits of PACA funds, to the extent that such funds were then paid to creditors who

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[3] The plaintiffs who have appealed are American Banana Co., Inc., Finest Fruits, Inc., Bronco Produce Corp., Jacobson Produce Corp., Morris Okun, Inc., D.M. Rothman, Inc., Rubin Bros. Produce Corp., Rosenthal & Klein, Inc., Square Produce, Inc., Post & Taback, Inc., A.J. Trucco Corp., and Wishnatzki & Nathel, Inc.

were not beneficiaries of the PACA trust. The Court then awarded the Sellers $278,967 in damages and interest. On appeal, both parties challenge the scope of liability. For the reasons that follow, we reverse the judgment of the District Court and remand with instructions to enter judgment for HSBC.

BACKGROUND

I. PACA

Congress enacted PACA in 1930 to regulate the sale and marketing of produce in interstate commerce. *See* h.r. rep. no. 98-543, at 3 (1983), *reprinted in* 1984 U.S.C.C.A.N. 405, 406; *Endico Potatoes, Inc. v. CIT Group/Factoring, Inc.*, 67 F.3d 1063, 1066 (2d Cir.1995). Through PACA, Congress sought "to encourage fair trading practices in the marketing of perishable commodities by suppressing unfair and fraudulent business practices in marketing of fresh and frozen fruits and vegetables ... and providing for collecting damages from any buyer or seller who fails to live up to his contractual obligations." h.r. rep. no. 98-543, at 3 (1983), *reprinted in* 1984 U.S.C.C.A.N. 405, 406.

Among other things, PACA requires licensing of all entities qualifying as commission merchants, dealers, and brokers ("buyers"), *see* 7 U.S.C. § 499c; bars a variety of unfair trade practices by buyers, *see id.* § 499b; and provides various remedies when violations occur, *see id.* § 499e. PACA requires buyers to make "full payment promptly" for all commodities received from produce sellers. *Id.* § 499b(4). If a buyer fails to make a prompt payment, a seller may seek to recover resulting damages by either (1) filing a complaint with the Secretary of the U.S. Department of Agriculture

("USDA"), or (2) filing a lawsuit "in any court of competent jurisdiction." *Id.* § 499e(a), (b).[4]

In the early 1980s, Congress reexamined PACA in the wake of a sharp increase in defaults among buyers. Although it found that PACA generally worked well in making the marketing of perishable agricultural commodities more orderly and efficient, Congress determined that sellers needed greater protection. *See* h.r. rep. no. 98-543, at 3 (1983),

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[4] If the seller chooses the former route, it must first file an informal complaint with the USDA within nine months after the claim accrues. *See* 7 C.F.R. § 47.3(a). Once it receives the informal complaint, the USDA will investigate the matter, and if it finds no violation, it will take no further action. *See id.* § 47.3(b)(1). If the allegations and investigation "seem to warrant [further] action," however, the USDA will attempt to mediate an amicable settlement. *Id.* § 47.3(b)(2); *see also* U.S. Department of Agriculture, Agricultural Marketing Service, Fruit and Vegetable Programs, *PACA Fact Finder* at 2, *available at* http://www.ams.usda.gov/fvpaca/FactFinder.pdf (last visited Feb. 24, 2004). If this procedure fails to effect a settlement, the seller may file a formal complaint with the USDA within 90 days of notification of the opportunity to proceed formally. *See* 7 C.F.R. § 47.6(a). If, in adjudicating the formal complaint, the USDA determines that the buyer has failed to pay promptly, the USDA must determine the amount of damages and issue a reparation order directing the buyer to pay that amount to the seller. *See* 7 U.S.C. §§ 499f, 499g. In addition, the USDA "may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender." *Id.* § 499h(a). Instead of suspending or revoking the seller's license, the USDA "may assess a civil penalty not to exceed $2,000 for each violative transaction or each day the violation continues." *Id.* § 499h(e).

reprinted in 1984 U.S.C.C.A.N. 405, 406. Congress noted that, as a result of the exigencies of the perishable commodities business, sellers were typically required to sell their produce quickly and frequently found themselves in the position of unsecured creditors of buyers whose creditworthiness could not be verified. If buyers defaulted, sellers could look only to the commodities (which would have perished) or to the sales proceeds of the commodities. Since sellers were typically unsecured creditors, they generally stood in line behind banks and other lenders who had obtained security interests in the defaulting purchaser's inventories, proceeds, and receivables. As a result, sellers were often unable to collect monies owed to them. *See* 7 U.S.C. § 499e(c)(1); h.R. Rep. No. 98-543, at 3-4 (1983), *reprinted in* 1984 U.S.C.C.A.N. 405, 406-07; *Endico Potatoes,* 67 F.3d at 1067; *JSG Trading Corp. v. Tray-Wrap, Inc.*, 917 F.2d 75, 77 (2d Cir.1990). Congress viewed this instability as a burden on commerce and contrary to the public interest. *See* 7 U.S.C. § 499e(c)(1); h.r. rep. no. 98-543, at 4-5 (1983), *reprinted in* 1984 U.S.C.C.A.N. 405, 408.

As a remedy, Congress amended PACA in 1984 to make the sellers' interests in the commodities and sales proceeds superior to those of the buyers' creditors, including secured creditors. It did so by adding section 499e(c), which requires licensed dealers to hold all perishable commodities purchased on short-term credit, as well as sales proceeds, in trust for the benefit of unpaid sellers:

> Perishable agricultural commodities received by a commission merchant, dealer, or broker in all transactions, and all inventories of food or other products derived from perishable agricultural commodities, and any receivables or proceeds from the sale of such commodities or products, shall be

> held by such commission merchant, dealer, or broker in trust for the benefit of all unpaid suppliers or sellers of such commodities or agents involved in the transaction, until full payment of the sums owing in connection with such transactions has been received by such unpaid suppliers, sellers, or agents.

7 U.S.C. § 499e(c)(2). This provision impresses a "non-segregated 'floating' trust" on the commodities and their derivatives, in the sense that it permits buyers--i.e., trustees--to commingle PACA trust assets with their other assets. 7 C.F.R. § 46.46(b); *accord Endico Potatoes,* 67 F.3d at 1067; *JSG Trading,* 917 F.2d at 78; h.r. rep. no. 98-543, at 2, 4, 5, 10, 11, 12 (1983), *reprinted in* 1984 U.S.C.C.A.N. 405, 406, 407, 409, 414, 415. To enforce payment from the trust, PACA beneficiaries may sue in an appropriate U.S. district court. 7 U.S.C. § 499e(c)(5)(i).[5]

Through these mechanisms Congress, in effect, extended a new benefit to produce sellers. To be entitled to trust protection the sellers were required to extend only short-term credit, *see* h.r. rep. no. 98-543, at 6-7 (1983), *reprinted in* 1984 U.S.C.C.A.N. 405, 410; Regulations Under the Perishable Agricultural Commodities Act; Addition of Provisions to Effect a Statutory Trust, 49 Fed.Reg. 45735, 45738 (Nov. 20, 1984) [hereinafter Trust Regulations], and, in the event of defaults, promptly to pursue administrative and judicial remedies. *See Patterson Frozen Foods, Inc. v. Crown Foods Int'l, Inc.,* 307 F.3d 666, 671 (7th Cir.2002); *In re: Havana Potatoes of N.Y. Corp.,* 55 Agric. Dec. 1234 (U.S.D.A.1996). The sellers' prompt resort to administrative

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[5] In addition, the USDA may sue in U.S. district court to "prevent and restrain dissipation of the trust." *Id.* § 499e(c)(5)(ii).

remedies was intended to isolate and to put pressure on financially insecure buyers to meet their obligations or to be forced from the business. The sellers who complied were, in turn, afforded a highly unusual trust beneficiary status that permitted them, in the case of defaults, to trump the buyers' other creditors, including secured ones. But nothing in the text of PACA, in its legislative history, or in its implementing regulations indicates that PACA's super-priority was intended to benefit sellers who dealt in other than short-term credit in accordance with PACA's regulations. *See Patterson Frozen Foods,* 307 F.3d at 671; h.r. rep. no. 98-543, at 6-7 (1983), *reprinted in* 1984 U.S.C.C.A.N. 405, 410; Trust Regulations, *supra,* 49 Fed.Reg. at 45738.

II. Factual Background

Until its demise in September 1996, PMD bought and sold produce at the New York City Terminal Market at Hunts Point, New York ("Market"). To facilitate its business, PMD opened a checking account at HSBC in October 1995. All of the monies PMD deposited into its HSBC account were proceeds from the sale of produce and thus covered by PACA's trust provision, as HSBC knew. *Am. Banana Co. v. Republic Nat'l Bank of N.Y., N.A.,* No. 99 Civ. 1330(AGS), slip op. at 3, 9 (S.D.N.Y. Aug. 6, 2002).[6] During this

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[6] After opening the account at HSBC, PMD began depositing its cash and check receipts into that account and then transferring the monies to other checking accounts it had at different banks, which PMD used to pay its creditors. It did this because many of PMD's creditors also maintained accounts at HSBC, and checks drawn on PMD's HSBC account and deposited by those merchants into their own HSBC accounts thus would clear almost immediately. By using an account at a different bank, PMD could create a two- to three-day "float" between the time that PMD delivered checks and

relationship, HSBC processed hundreds of PMD checks made payable to dozens of payees, typically produce sellers, in the normal course of business.[7]

In January 1996, HSBC began to provide PMD with overdraft privileges as the bank began to receive checks presented for payment against PMD's account in amounts greater than the available funds in the account. On the mornings after such checks were presented to HSBC, the bank's computer system automatically issued a "referral report" that showed PMD's available funds, total funds on deposit (including deposited checks that had not yet cleared), and the amount and number of checks presented for payment the previous day. HSBC then would contact Mark Werner, PMD's owner, and request that he make a deposit to cover checks that had been presented the previous day. In this manner, HSBC would honor PMD checks by providing "daylight" overdraft accommodations that were covered by promised deposits within a few days. HSBC used checks deposited by PMD to reduce temporarily its overdraft balance. *Am. Banana, supra,* slip op. at 7-9.

The result of these procedures was that the Sellers were paid in the ordinary course of business and that delays in

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the time those checks were presented for payment. *Am. Banana, supra,* slip op. at 6-7.

[7] HSBC was neither an investor in, nor a secured lender to, PMD apart from the fact that late in the relationship it secured personal guarantees from PMD's principals. Consequently, HSBC was not called on to make the type of ongoing inquiry into the business condition of PMD a secured lender would typically make. *Cf. Albee Tomato, Inc. v. A.B. Shalom Produce Corp.*, 155 F.3d 612, 614, 616-18 (2d Cir.1998).

payments were reduced. HSBC's Hunts Point branch manager, Joseph Vessecchia, testified that because PMD was a high-volume, low-margin business, the fact that PMD used its overdraft privileges for very short periods of time did not indicate to him that PMD was in financial distress. In the period between June 1996 and September 1996, during which most of Sellers' claims accrued, there was a total of forty days in which PMD exercised its overdraft privileges, and the average overdraft on those days was $38,000. *Id.* at 8-9.

In July 1996, several of PMD's customers began slowing their payments to PMD, resulting in a tightening of PMD's cash position. Eventually, when PMD's payables began to race ahead of payments on its receivables, Werner realized that he could not sustain the company and ceased operations on September 14, 1996. At that time, PMD owed $787,353.21 to the Sellers for produce it had purchased on credit. *Id.* at 4-6, 10.

After ceasing PMD's operations, Werner proposed a debt-repayment plan to PMD's trust creditors, including the Sellers, asking them to forbear from enforcing their PACA trust rights so that he could continue buying and selling produce, preserve his business relationships with market dealers, and pay PMD's trust creditors over time. In late September 1996, PMD's trust creditors met with Werner to discuss his proposal. The Sellers' representatives and their attorney attended the meeting. At the meeting, Werner proposed (1) to assign to the New York Produce Trade Association ("Association"), of which the Sellers were members, all of PMD's accounts receivable as well as PMD's one-half interest in a cooperative unit in the Market, and (2) to make monthly payments of between $16,000 and $20,000 to the Association to be distributed *pro rata* to PMD's creditors. In return, Werner asked his creditors to forebear

from enforcing their trust rights to enable him to remain in business, in part by working for one of his creditors, E. Armata, Inc., so he could make the monthly payments from profits he would continue to earn. After Werner presented this proposal, the creditors discussed it and twenty minutes later orally informed Werner that they had accepted the workout-and-forbearance proposal. *Id.* at 10-11.

Werner subsequently executed the assignments and made some payments to the Association, but the Sellers ultimately were unsatisfied with their recovery and pursued claims against HSBC in the District Court. They claimed, *inter alia,* that HSBC's receipt of funds subject to a PACA trust and retention of them in repayment of PMD's overdraft balance violated PACA.

Following a three-day bench trial, the District Court granted judgment to the Sellers. It explained that HSBC, as a third party, could be liable for receiving trust assets in breach of trust only if PMD, as the trustee, had itself breached the PACA trust by transferring those assets to the bank. *Id.* at 13. After examining PMD's actions, the Court found that PMD had not breached the trust by depositing any funds that were used to pay PACA beneficiaries. *Id.* (citing *Boulder Fruit Express & Heger Organic Farm Sales v. Transp. Factoring, Inc.*, 251 F.3d 1268, 1272 (9th Cir.2001), *cert. denied,* 534 U.S. 1133, 122 S.Ct. 1077, 151 L.Ed.2d 978 (2002)). However, the Court also found that PMD had breached the trust when it deposited funds that were used to pay non-PACA creditors. *Id.* The Court then turned to the issue of HSBC's liability and held the bank liable for receiving the latter deposits, reasoning that the overdrafts had been loans, that the deposits made by PMD constituted repayments of those loans, and that, by receiving those repayments, HSBC retained trust funds for itself which were

required to be distributed to unpaid PACA beneficiaries. *Id.* at 14. The Court also rejected each of HSBC's three defenses--(1) that HSBC was a "bona fide purchaser" for value of the trust assets, (2) that the post-default agreement rendered the Sellers ineligible to recover under PACA, and (3) that laches barred the Sellers' claims. *Id.* at 14-17. Accordingly, the District Court, in a series of amended orders, entered judgment for the Sellers for $278,967, including interest. *See id.* at 17; *Am. Banana Co. v. Republic Nat'l Bank of N.Y., N.A.*, No. 99 Civ. 1330(AGS), Am. Order at 2-5 (S.D.N.Y. Oct. 4, 2002); *Am. Banana Co. v. Republic Nat'l Bank of N.Y., N.A.*, No. 99 Civ. 1330(AGS), Am. J. at 1-2 (S.D.N.Y. Oct. 18, 2002).

On this appeal, the Sellers seek damages from HSBC in the amount of $787,353.21, the full amount PMD owes them, on the theory that HSBC violated PACA every time it used a deposit from PMD to offset PMD's overdraft balance. HSBC cross-appeals, contesting its liability. We review the District Court's findings of fact for clear error and its conclusions of law *de novo*. *Oscar Gruss & Son, Inc. v. Hollander*, 337 F.3d 186, 193 (2d Cir.2003).

DISCUSSION

I. HSBC's Liability

The Sellers contend that the District Court erred by limiting HSBC's liability to only those deposits that were ultimately used to pay non-PACA creditors. They claim that *all* deposits used to offset PMD's overdraft balance constituted payments to a non-PACA creditor--namely, HSBC--regardless of whether PMD later withdrew the funds to pay someone else. According to the Sellers, therefore, HSBC violated PACA whenever it applied PMD deposits to

offset PMD's overdraft balance. Consequently, the Sellers argue, any funds received in this fashion dissipated trust assets, regardless of whether they were subsequently paid out to PACA or non-PACA creditors, and are recoverable to the full extent of PMD's debt to the Sellers ($787,353.21), rather than just to the extent funds were ultimately paid to non-PACA creditors ($181,129). HSBC contends that, with the exception of the fees and interest payments retained in consideration for the overdraft privileges extended to PMD, the bank was a mere "conduit" for all trust funds that were deposited in PMD's account, because those funds were released by the bank freely and at PMD's direction.

We previously have explained that the trust created by PACA is governed by general trust principles. *Albee Tomato,* 155 F.3d at 615; *Endico Potatoes,* 67 F.3d at 1067. Under such principles, as correctly noted by the District Court, a third party such as HSBC cannot be liable for receiving funds in breach of a PACA trust unless the trustee's transfer of funds to the third party constituted a breach of its duty as trustee to maintain trust assets. *See* RESTATEMENT (SECOND) OF TRUSTS § 283 (1959). The Restatement of Trusts defines a breach of trust as "a violation by the trustee of any duty which as trustee he owes to the beneficiary." *Id.* § 201. Federal regulations, in turn, prescribe the duties of a PACA trustee:

> Commission merchants, dealers and brokers are required to maintain trust assets in a manner that such assets are freely available to satisfy outstanding obligations to sellers of perishable agricultural commodities. Any act or omission which is inconsistent with this responsibility, including

> dissipation of trust assets, is unlawful and in violation of Section 2 of the Act, (7 U.S.C. [§] 499b).

7 C.F.R. § 46.46(d)(1). The same regulations define "dissipation," in turn, as "any act or failure to act which could result in the diversion of trust assets or which could prejudice or impair the ability of unpaid suppliers, sellers, or agents to recover money owed in connection with produce transactions." *Id.* § 46.46(a)(2).

In light of these principles and the facts of this case, two distinct PACA trust issues are presented. The first issue is whether *the trustee* is liable for dissipating the trust by using trust funds to pay non-PACA creditors. The second issue is whether *the bank* is liable for receiving funds in breach of trust in the circumstances presented. With respect to the first issue--the trustee's liability--the District Court concluded that PMD had breached the trust by making payments out of trust funds to non-PACA creditors. With respect to the second issue--the bank's liability--the District Court appears to have assumed, without explanation, that HSBC automatically shared PMD's liability for dissipating trust funds, apparently on the basis that the funds PMD paid to non-PACA creditors were withdrawn from an account at HSBC. That is, the District Court assumed HSBC's liability in these circumstances without separately considering the role, if any, the bank played in PMD's breach of trust.

However, concluding that PMD's use of trust funds to pay non-PACA creditors constituted a breach of the trust by PMD does not necessarily compel the further conclusion that such a breach is attributable to HSBC. To evaluate HSBC's liability, we must examine *HSBC's* actions, and here it appears that HSBC took no action that inhibited PMD's ability to pay PACA beneficiaries and, indeed, had no practical

control over the payments PMD made to non-PACA creditors. It merely honored checks that it was entitled to presume were validly drawn. *See In the Matter of Knox,* 64 N.Y.2d 434, 488 N.Y.S.2d 146, 477 N.E.2d 448, 450-51 (1985); *Bischoff v. Yorkville Bank,* 218 N.Y. 106, 112 N.E. 759, 760-61 (1916). Third parties such as banks, it must be remembered, are not guarantors of the PACA trust. *See Boulder Fruit,* 251 F.3d at 1272; *see also Sunkist Growers, Inc. v. Fisher,* 104 F.3d 280, 283 (9th Cir.1997); *Consumers Produce Co. v. Volante Wholesale Produce, Inc.,* 16 F.3d 1374, 1381 (3d Cir.1994). It seems to us that the imposition of liability on HSBC under the facts of this case would impose an impossible burden on banks to monitor each check drawn on an overdrawn PACA trust account, which would be inconsistent with well-established banking law. *See Knox,* 488 N.Y.S.2d 146, 477 N.E.2d at 450-51; *Bischoff,* 112 N.E. at 760-61. The imposition of liability under such circumstances would also run the serious risk of complicating--if not eliminating altogether--overdraft procedures that directly benefit PACA beneficiaries.

Nor are we convinced that a trustee's payments of commercially reasonable fees and interest in exchange for routine banking services such as check cashing services and overdraft privileges extended to facilitate payments to beneficiaries necessarily constitute a breach of the PACA trust. *Cf. Boulder Fruit,* 251 F.3d at 1271-72 (concluding that a factoring agreement, under which trustee sold its receivables at eighty percent of face value, was not a *per se* breach of trust under PACA and, because the discount rate had not been shown to be commercially unreasonable, did not constitute a breach under the facts of the case).

Ultimately, however, we need not resolve these various issues. Even assuming that HSBC did retain the funds, it has

a complete defense to PACA liability arising from the post-default agreement between the Sellers and PMD, which we discuss below.

II. HSBC's Defense

Strict eligibility requirements accompany the extraordinary protection afforded by PACA's trust provision. One such requirement is that a seller seeking PACA trust protection must be selling produce on a cash or short-term credit basis. *See* 7 U.S.C. § 499e(c); 7 C.F.R. § 46.46(e)(1)-(2); *Endico Potatoes,* 67 F.3d at 1067 n. 2; *Patterson Frozen Foods,* 307 F.3d at 669 (citing *Greg Orchards & Produce, Inc. v. Roncone,* 180 F.3d 888, 890-91 (7th Cir.1999)). As noted above, PACA requires buyers to make "full payment promptly." 7 U.S.C. § 499b(4). Instead of prescribing a specific period of time in the statute that will satisfy this requirement, Congress left the definition of prompt payment to the regulatory discretion of the Secretary of the USDA. *See id.* § 499e(c)(3). The pertinent regulations promulgated by the USDA in conjunction with the trust provision provide:

> (1) The times for ... prompt payment are set out in § 46.2 ... (aa). Parties who elect to use different times for payment must reduce their agreement to writing before entering into the transaction and maintain a copy of their agreement in their records, and the times of payment must be disclosed on invoices, accountings, and other documents relating to the transaction.
>
> (2) The maximum time for payment for a shipment to which a seller, supplier, or agent can agree and still qualify for coverage under the trust is 30 days after

> receipt and acceptance of the commodities as defined in § 46.2(dd) and paragraph (a)(1) of this section.

7 C.F.R. § 46.46(e). Section 46.2(aa), in turn, provides:

> Full payment promptly is the term used in the act in specifying the period of time for making payment without committing a violation of the act. "Full payment promptly," for the purpose of determining violations of the act, means:
> ...
>
> (5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted;
> ...
>
> (11) Parties who elect to use different times of payment than those set forth in paragraphs (aa)(1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then payment within the agreed upon time shall constitute "full payment promptly": Provided, That the party claiming the existence of such an agreement for time of payment shall have the burden of proving it.

Id. § 46.2(aa). In summary, these regulations require a buyer to pay the seller within ten days after the buyer has accepted the produce, but permit the parties to agree in writing before the transaction to other payment periods that do not exceed thirty days. Sellers who offer payment periods of longer than thirty days are not entitled to PACA trust protection.

HSBC claims that the Sellers disqualified themselves from PACA trust protection by entering into the post-default agreement with PMD that extended the payment period well beyond the thirty-day maximum allowed under the PACA regulations. *Id.* § 46.46(e)(2). The Sellers, on the other hand, contend that in order to waive PACA trust protection, a seller must enter into a written agreement, which they did not do here. The District Court agreed with the Sellers and rejected HSBC's defense. *Am. Banana, supra,* slip op. at 11, 16.

In reviewing the District Court's rejection of this defense, we must first consider whether the thirty-day maximum under section 46.46(e)(2) applies to post-default agreements. Although HSBC's argument and the District Court's decision assume that it does, and other circuits apparently have so held, *see, e.g., Greg Orchards & Produce,* 180 F.3d at 891-92; *In re Lombardo Fruit & Produce Co.,* 12 F.3d 806, 809-10 (8th Cir.1993), we find that such a conclusion is not clear from the text of PACA or its regulations, both of which discuss only *pre-transaction* agreements. *E.g.,* 7 U.S.C. § 499e(c)(3) ("The unpaid supplier, seller, or agent shall lose the benefits of such trust unless such person has given written notice of intent to preserve the benefits of the trust to the commission merchant, dealer, or broker within thirty calendar days ... (ii) after expiration of such other time by which payment must be made, as the parties have expressly agreed to in writing *before entering into the transaction* ...." (emphasis added)); 7 C.F.R. § 46.46(e)(1) ("Parties who elect to use different times for payment must reduce their agreement to writing *before entering into the transaction* ...." (emphasis added)). We therefore turn to the legislative history of PACA to discern whether Congress intended to extend trust protection to sellers that enter into agreements after a buyer defaults that contain a payment period exceeding thirty

days after the buyer has accepted the produce. *See United States v. Gayle,* 342 F.3d 89, 93-94 (2d Cir.2003) ("Resort to authoritative legislative history may be justified where there is an open question as to the meaning of a word or phrase in a statute, or where a statute is silent on an issue of fundamental importance to its correct application.").

The House Report accompanying the 1984 amendment to PACA makes clear that Congress intended trust protection to extend solely to cash and short-term credit transactions:

> The committee finds that it is common practice in the produce business to extend credit for reasonable periods of time beyond the time prescribed for 'cash' transactions in regulations issued by the Secretary under the provisions of the Packers and Stockyards Act. Consequently, to be effective, the trust applies to credit transactions as well as to the straight cash transactions. *However, the committee does not intend the trust to apply to any credit transaction that extends beyond a reasonable period.* Under the bill, the Secretary is required to establish, through rulemaking, the time by which, the parties to a transaction must agree payment on a transaction must be made, to qualify it for coverage under the trust. *An agreement for payment after such time will not be eligible to receive the benefits of the trust.*

h.r. rep. no. 98-543, at 6-7 (1983), *reprinted in* 1984 U.S.C.C.A.N. 405, 410 (emphases added). The thirty-day provision thus resulted from Congress's explicit desire to limit its extension of trust protection to reasonably short-term credit arrangements:

> Congress directed the Secretary to establish the maximum time by which the parties to a transaction can agree payment must be made and still qualify for coverage under the trust. An agreement for payment after such time will not qualify for trust coverage.
>
> Current payment practices, as reflected by administrative experience and industry sources, indicate that contracts calling for payment within 30 days from receipt and acceptance of the goods should qualify for trust coverage, and that contracts that call for later payment should not qualify for trust coverage.

Trust Regulations, *supra,* 49 Fed.Reg. at 45738. The primary objective of securing prompt payment was to protect sellers in this volatile industry. *See* h.r. rep. no. 98-543, at 2-4 (1983), *reprinted in* 1984 U.S.C.C.A.N. 405, 406-07 ("Producers and shippers of perishable commodities are, for the most part, small size businesses. The process of growing[,] harvesting, packing and shipping perishables is a real gamble; costs are high, capital is tied up in farm land and machinery, and returns are delayed until the crop is sold. If the grower-shipper cannot realize any returns on the sale of the crop when due, he may not be able to survive."). Congress made its intention to protect short-term payment arrangements clear by expressly refusing to bestow trust protection upon "any credit transaction that extends beyond a reasonable period," h.r. rep. no. 98-543, at 6-7 (1983), *reprinted in* 1984 U.S.C.C.A.N. 405, 410. The USDA's regulations tying the definition of a "reasonable period" to its definition of "full payment promptly" corroborate our interpretation. 7 C.F.R. §§ 46.46(e)(1)-(2), 46.2(aa)(5), (11).

The question becomes, therefore, whether there is a meaningful difference between pre-transaction and post-default agreements in light of this legislative history. We conclude that there is not. We recognize that a post-default agreement is often the product of a reasonable effort by a seller to recover at least some of the debt owed to it without incurring the risks and costs of litigating under PACA, and that such an agreement therefore can be a useful tool for the recovery of unpaid debts. However, the result of a post-default agreement extending the payment period beyond thirty days is no different than that of a pre-transaction agreement doing the same: both are inconsistent with the prompt-payment objective, which is fundamental to PACA. Whether the agreement is reached before the transaction or after a buyer has defaulted, it constitutes a credit arrangement permitting a buyer to make payments that are not considered prompt by Congress and the USDA.

Furthermore, such credit arrangements, though intended to enable buyers who are unable to make prompt payments to stay in business, can have negative, industry-wide implications:

> Just as in the case of the savings and loan industry, if a PACA licensee is in financial difficulty (i.e., not able to pay the agreed purchase prices of perishable agricultural commodities promptly), the loss to the perishable agricultural commodities industry as a whole is frequently much less if the PACA licensee's license is revoked promptly. Allowing a PACA licensee that is in financial difficulty to remain in business increases financial risks to others. Frequently, a PACA licensee in financial difficulty increases its volume significantly, perhaps taking imprudent risks. If the PACA licensee's efforts to

> regain financial stability are unsuccessful, many other unsuspecting persons are exposed to the risk of nonpayment.

Havana Potatoes, 55 Agric. Dec. 1234. This is particularly true after a buyer has demonstrated its financial instability by defaulting on its payment obligations. Therefore, Congress could not have intended to exempt from disqualification sellers who enter into post-default agreements extending a payment period beyond thirty days, while specifically disqualifying sellers who enter into pre-transaction agreements having the same effect. Sellers who are willing and able to enter into such agreements--whether pre-transaction or post-default--neither need nor deserve the elevated priority they receive under PACA's trust provision. As the Seventh Circuit recently observed:

> Another major objective of PACA is to avoid large financial collapses in the produce industry. The strict 30-day time limits are purposely designed to bring a subper-forming [sic] dealer to the attention of the USDA quickly, so that it can act to resolve the problem or suspend the dealer's license. If one industry member is in financial distress, not much is at stake. But if many large wholesalers work out long-term payment plans and extensions, allowing a dealer to amass huge liabilities, that dealer's eventual bankruptcy or license revocation could cause much more severe repercussions throughout the industry. One would not want to reward the wholesalers who helped create such a mess by then giving them a strong right to recover their debts through

> superpriority in bankruptcy or through trust suits piercing the corporate veil.

Patterson Frozen Foods, 307 F.3d at 671; *see also Greg Orchards & Produce, Inc. v. Roncone*, 180 F.3d 888, 892 (7th Cir.1999) ("By disqualifying suppliers who enter into post-default agreements that violate PACA, we can ensure that the extraordinary protection provided by PACA is not enlarged beyond its intended scope."); *Tri-County Wholesale Produce Co. v. U.S.D.A.*, 822 F.2d 162, 163 (D.C.Cir.1987) (noting that a primary " 'goal of [PACA is] that only financially responsible persons should be engaged in the businesses subject to the Act' " (quoting *Finer Foods Sales Co., Inc. v. Block*, 708 F.2d 774, 782 (D.C.Cir.1983)) (alteration in original)).

Accordingly, we conclude that Congress's intention in not applying the trust to "any credit transaction that extends beyond a reasonable period," h.r. rep. no. 98-543, at 6-7 (1983), *reprinted in* 1984 U.S.C.C.A.N. 405, 410, is best effectuated by understanding section 46.46(e)(2) of the PACA regulations to be applicable to post-default as well as pre-transaction agreements.

Having concluded that section 46.46(e)(2) applies to post-default agreements, we must next determine whether the District Court correctly rejected HSBC's argument that the Sellers lost trust protection by entering into a post-default agreement with PMD that extended the payment period beyond thirty days. When it rejected this defense, the District Court reasoned that although there was a written proposal by Werner to pay PMD's debt that "PMD's trust creditors [orally] had accepted," and although Werner had performed some of his obligations under the agreement, "plaintiffs never signed any written agreement under which they agreed to

forebear from asserting their rights under PACA." *Am. Banana, supra,* slip op. at 11, 16. The District Court concluded, in other words, that although the Sellers and PMD had, in fact, entered into a post-default agreement, that agreement did not disqualify the Sellers from PACA trust protection because it was not in writing.

In reaching its conclusion, the District Court followed the approach taken by the Seventh and Eighth Circuits, which have held that a written--but not an oral--post-default agreement between a seller and a dealer that extends the dealer's time for payment beyond thirty days results in the loss of the seller's trust protection. *See Patterson Frozen Foods,* 307 F.3d at 669- 70; *In re Lombardo Fruit & Produce,* 12 F.3d at 809-10 & n. 3; *Hull Co. v. Hauser's Foods, Inc.,* 924 F.2d 777, 781-82 (8th Cir.1991). As the Seventh Circuit recently explained:

> If a produce supplier enters a written post-default agreement with a dealer that extends the dealer's time for payment beyond 30 days, the supplier becomes ineligible to assert its trust rights. On the other hand, an oral agreement for an extension or a course of dealing allowing more than 30 days for payment will not abrogate a PACA trust.

Patterson Frozen Foods, 307 F.3d at 669 (citations omitted).[8] Under this approach, all oral agreements concerning payment periods are disregarded for purposes of PACA liability, resulting in imposition of the ten-day default and preservation of trust protection for the seller.

We find nothing in the text of PACA or in its regulations which requires that a provable post-default agreement extending a payment period beyond thirty days must, without exception, be reduced to writing before it will disqualify a seller from PACA's trust protection. The regulations merely provide that "[p]arties who elect to use different times of payment ... must reduce their agreement to writing before entering into the transaction." 7 C.F.R. § 46.2(aa). In view of Congress's clearly expressed intention to extend trust protection solely to cash and short-term credit transactions, *see* 7 U.S.C. § 499e(c); 7 C.F.R. §§ 46.46(e), 46.2(aa), we cannot interpret this regulation to mean that parties are free to enter into agreements that violate PACA's prompt payment

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[8] Although the Seventh Circuit cited *Idahoan Fresh v. Advantage Produce, Inc.*, 157 F.3d 197, 205 (3d Cir.1998), for the proposition that "an oral agreement for an extension ... allowing more than 30 days for payment will not abrogate a PACA trust," *Patterson Frozen Foods*, 307 F.3d at 669, we note that, to the contrary, *Idahoan Fresh* expressly did "not reach[ ] the issue of what would happen if the oral extension provided for a payment period in excess of 30 days" because that situation was not presented. 157 F.3d at 205 n. 8. Rather, in addressing oral agreements extending payment periods of 15 and 20 days, the *Idahoan Fresh* court found that the writing requirement articulated in PACA and its regulations "relates to the enforceability of an agreement to extend a payment term, but does not disqualify an unpaid seller from receiving trust benefits." *Id.* at 204.

rules as long as they do not reduce their agreements to writing.

Rather, we conclude that a failure to reduce to writing an agreement that violates PACA, should not result in the preservation of the trust, where the same agreement, if memorialized, would have resulted in forfeiture of such protection. To hold otherwise would yield the unacceptable result of preserving trust protection for a seller who reaches an agreement containing a payment period exceeding thirty days and performs thereunder so long as the seller does not reduce the agreement to writing. Accordingly, we hold that where, as here, a seller agrees--orally or in writing--to a payment period exceeding thirty days, it forfeits trust protection.

Even if we were to assume *arguendo* that a writing is required, we hold that there are writings in this case that satisfy the generally applicable Statute of Frauds, and that such writings are sufficient to disqualify the Sellers from trust protection. *See Patterson Frozen Foods,* 307 F.3d at 671 ("PACA rights are lost whenever the parties enter into a written agreement that satisfies the generally applicable Statute of Frauds."). As discussed, PACA does not set out specific requirements for post-default agreements, and under the Restatement of Contracts,

> [u]nless additional requirements are prescribed by the particular statute, a contract within the Statute of Frauds is enforceable if it is evidenced by any writing, signed by or on behalf of the party to be charged, which
>
> (a) reasonably identifies the subject matter of the contract,

(b) is sufficient to indicate that a contract with respect thereto has been made between the parties or offered by the signer to the other party, and

(c) states with reasonable certainty the essential terms of the unperformed promises in the contract.

RESTATEMENT (SECOND) OF CONTRACTS § 131 (1981); *see also Patterson Frozen Foods*, 307 F.3d at 671-72 (concluding that "PACA rights are lost whenever the parties enter into a written agreement that satisfies the generally applicable Statute of Frauds"); *Consolidation Servs., Inc. v. KeyBank Nat'l Ass'n*, 185 F.3d 817, 819 (7th Cir. 1999) ("An ordinary statute of frauds merely requires that the party sought to be charged ... sign a memorandum of the parties' agreement. The memorandum needn't be the contract itself; it need only be evidence of the contract and the contract's essential terms, and the other party to the alleged contract need not have signed anything." (citations omitted)). In *Patterson Frozen Foods*, the court found that a fax and a letter, signed by the seller's agent, reasonably identified the contract's subject matter and demonstrated agreement on payment periods because they contained a payment schedule in which the dealer would pay $8,356.46 per month for eight months, which the seller found to be "agreeable." 307 F.3d at 668, 670-71. Those documents also "state[d] with reasonable certainty the unperformed promises in the contract, that [the trustee would] pay on the dates indicated, and that [the seller would] forebear from going forward with its PACA reparation action so long as payments [we]re forthcoming." *Id.* at 671.

In this case, HSBC points to several writings it believes collectively satisfy the Statute of Frauds. The first, to which HSBC points only for context, is an undated letter drafted

sometime prior to October 27, 1996 from Werner to the Sellers' counsel, written to "bring [the Sellers' counsel] up to date on what [Werner was] doing to comply with the directions of the Association on collecting [PMD's] receivables and other matters." Letter from M. Werner to L. Kreinces. In that letter, Werner discusses his efforts to collect PMD's accounts receivable, advises the Sellers' counsel that he will be starting work with E. Armata on October 27, 1996, and acknowledges the Sellers' counsel's desire for him to "sign some papers." *Id.* The second writing contains the "papers" likely referred to in Werner's pre-October 27, 1996 letter, an "Assignment of Accounts Receivable" drafted by the Sellers' counsel and signed by Werner and the Sellers' counsel on November 12, 1996. Assignment of Accounts Receivable of Nov. 12, 1996. In this document, PMD assigned to the Association, which was represented by the Sellers' counsel, all of its accounts receivable for produce it sold. *See id.* The third writing is a December 23, 1996 notice authored by the Sellers' counsel and sent to PMD's PACA creditors, in which the Sellers' counsel states that he has received "the first monthly installment from the debtor as a result of his operations with E. Armata, Inc.," in the amount of $7,500.00, and that similar payments "should continue on a monthly basis." Notice from L. Kreinces to Creditors of PMD of Dec. 23, 1996. The fourth writing, authored by the Sellers' counsel, is a March 27, 1997 letter to Werner's counsel "admonish [ing] [him and Werner] to meet with [one of PMD's account debtors] forthwith," stating that if they failed to do so, he would "serve Notices of Discovery and Inspection and Deposition notices without delay," and "suggest[ing] that [they] file a Notice of Appearance or an Answer with the U.S. District Court in order to complete jurisdiction." Letter from L. Kreinces to P. Haberman of Mar. 27, 1997. In the same document, the Sellers' counsel discusses the purchase

price of the one-half interest in the cooperative unit in the Market that Werner had proposed assigning to the Association, and in a subsequent letter to the Association dated May 11, 1998, the Sellers' counsel accounts for the sale of that unit for $50,000. *Id.;* Letter from L. Kreinces to L. Sherman of May 11, 1998. The fifth writing highlighted by HSBC is the Sellers' counsel's August 14, 1997 notice to PMD creditors stating that he had "been informed that [Werner] is no longer associated with E. Armata Inc. effective Sunday evening." Notice from L. Kreinces to Creditors of PMD of Aug. 14, 1997. The final writing highlighted by HSBC is the Sellers' counsel's letter to Werner's counsel, written two months later, on October 17, 1997, in which he states:

> I also want to know from you whether your client intends to make monthly payments on account of their debt to the Market. I shall like to know this well before the conference date. I must tell you this matter is at an end as far as I am concerned. I am proceeding to procure judgment and seek to collect all sums due on behalf of the merchants in the Market.
>
> There are other remedies which I am also considering which will proceed as time goes on. Unless you give this matter your immediate attention, I shall proceed as herein set forth.

Letter from L. Kreinces to E. Zinbarg of Oct. 17, 1997.

We conclude that these writings are sufficient to satisfy the Statute of Frauds. Like the letter and fax in *Patterson Frozen Foods,* all of the writings signed by the Sellers' counsel reasonably identify the post-default agreement's subject matter and demonstrate agreement between Werner

and the Sellers' representative on monthly payments, and the assignment of receivables and Werner's interest in the cooperative unit. They also state with reasonable certainty the unperformed promise in the contract--that Werner would continue to make monthly installments, similar to his first payment of $7,500, so long as he owed money to the Sellers. And they plainly demonstrate that the Sellers agreed to--and, in fact, for a period far in excess of thirty days did-- forebear from proceeding with their lawsuit as long as Werner made monthly payments. Because these writings are sufficient to satisfy the Statute of Frauds, we conclude that the Sellers are disqualified from asserting their trust rights against HSBC.[9]

CONCLUSION

For the foregoing reasons, we reverse the judgment of the District Court and remand with instructions to enter judgment for HSBC.

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[9] We therefore need not reach HSBC's other defenses.